THE

PRINCIPLES

OF THE

LAW OF EVIDENCE;

WITH

ELEMENTARY RULES

FOR CONDUCTING

THE EXAMINATION AND CROSS-EXAMINATION

OF

Witnesses.

William Twdesley

BY W. M. BEST, A.M., LL.B.,

OF GRAY'S INN, ESQ., BARRISTER-AT-LAW.

"Principiis, Cansis, et Elementis ignoratis, Scientia de quâ ipsa sunt, penitùs ignoratur."
Fortescue de Laud. Leg. Angl. c. 8.

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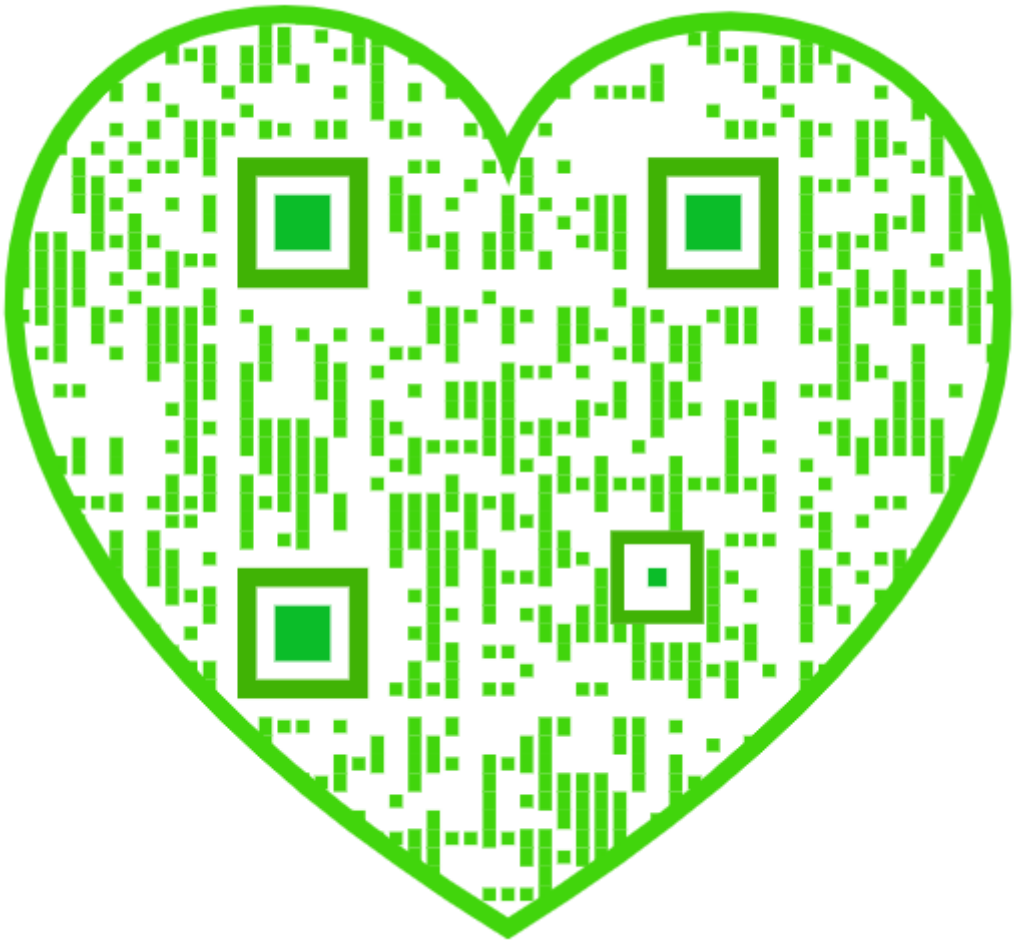

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TO THE FIFTH EDITION.

SHORTLY after the death of Mr. Best I undertook to prepare for the Press, that portion of the present edition of this Work which he had left unfinished.

The last proof-sheet corrected by my friend was that ending at page 128. But he had carefully noted up the whole Book. So that, in revising the remaining sheets, I have had the benefit of many suggestions which he had made for his own guidance; as well as the use of all the materials which he had collected, with a view to the preparation of this edition.

To these I have added some cases which appeared to have escaped the notice of my friend, and a few which have been decided since his death; and I

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trust that, in the result, the Book, in its present state, will be found to contain an accurate exposition of that branch of our law of which it treats, as settled by the most recent decisions.

JOHN A. RUSSELL.

TEMPLE,
Trinity Term, 1870.

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ORIGINAL PREFACE.

THE common law system of evidence, in its actual state the growth of the last two centuries, must ever claim the highest respect and admiration as a whole, however particular portions of it may be justly or unjustly condemned. Now the design of the present Work, is not to add to the *practical* treatises by which the subject has been illustrated, but to examine the *principles* on which its rules are founded, tracing them to their sources, and shewing their connexion with each other. To this are annexed a sketch of the practice relative to the offering and receiving evidence at trials, and a few elementary precepts, founded chiefly on those of Quintilian, for the guidance of young practitioners in interrogating witnesses.

Throughout the book, particularly in the Introduction when treating of judicial evidence in the abstract, much assistance has been derived from the Roman law, the civilians, and other foreign writers; and especially from the able work published by M. Bonnier, at Paris, in 1843, entitled "Traité Théorique et Pratique des Preuves en

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Droit Civil et en Droit Criminel." Large use has also been made of "Bentham's Rationale of Judicial Evidence," in five volumes, London, 1827; in which the general principles of evidence are ably discussed, and often happily illustrated. That book should, however, be read with caution, as it embodies several essentially mistaken views relative to the nature of *judicial* evidence, and which may be traced to overlooking the characteristic features whereby it is distinguished from other kinds of evidence. Some of these errors will be pointed out in the Introduction.

The Author begs to express his grateful acknowledgments for suggestions from many friends. The Index has been compiled by Mr. H. Macnamara, of the Inner Temple.

CHANCERY LANE,
July, 1849.

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THE

PRINCIPLES OF EVIDENCE,

&c. &c.

INTRODUCTION.

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Connexion between law and facts.

§ 1. Law has been correctly defined a rule of human action, prescribed and promulgated by sovereign authority, and enforced by sanction of reward or punishment. But although human actions are the subject-matter about which law is conversant they are not essential to its existence; for the rule is the same whether its application is called forth or not. "If you commit murder or steal you shall be punished;" "if you buy a man's lands or goods you shall pay for them;" would hold true as rules of law though no murder or theft were ever committed, and though every debt contracted were faithfully discharged. The rule continues in abstraction and theory until an act is done on which it can attach, and assume as it were a body and shape. The maxim of jurists and lawyers "ex facto oritur jus" (*a*), and such like, must be understood in this sense; and the duty of judicial tribunals consequently embraces the investigation of doubtful, or disputed facts, as well as the application of the principles of jurisprudence to such as are ascertained.

(*a*) 3 Blackst. Com. 329; 2 Inst. 49.

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Investigation of facts by judicial tribunals.

§ 2. Facts which come in question in courts of justice are inquired into and determined in precisely the same way as doubtful or disputed facts are inquired into and determined by mankind in general, except so far as positive law has interposed with artificial rules to secure impartiality and accuracy of decision, or exclude collateral mischiefs likely to result from the investigation. And this is strictly analogous to the relation between natural and municipal law, of which it has been well observed, "There are in nature certain fountains of justice, whence all civil laws are derived but as streams: and like as waters do take tinctures and tastes from the soils through which they run, so do civil laws vary according to the regions and governments where they are planted, though they proceed from the same fountains" (*b*). As therefore the study of natural law precedes that of municipal, so an inquiry into the natural resources of the human mind for the investigation of truth should precede an examination of the artificial means devised for its assistance: and the present Introduction will accordingly consist of two Parts devoted to these respective subjects.

(*b*) Bacon on the Advancement of Learning, Book 2.

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PART I.

EVIDENCE AND PROOF IN GENERAL.

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Human understanding.

§ 3. THE human understanding may be considered in three points of view, namely:—With respect to the sources of our ideas; the objects about which the human mind is conversant; and the intensity of our persuasions as to the truth or falsehood of facts or propositions.

1°. Sources of ideas. 1. Sensation.

§ 4. 1°. The best metaphysicians trace all our ideas to the sources of sensation or of reflexion (*c*). There

(*c*) Locke on the Human Understanding, bk. 2, ch. 1, and passim. The classification of ideas into those of sensation and reflexion, as the terms are here explained, includes those ideas which modern authors attribute to faculties they call "consciousness, spontaneity, &c." The truth of this part of Locke's ideal theory, when thus understood, seems admitted even by Stewart, Reid and Cousin, who have so severely attacked it in other respects; (see Stewart's Philosophical Essays, Essay 1, ch. 2, pp. 85, 86, 3rd Ed.; Stewart's Philosophy of the Human Mind, vol. 1, ch. 1, sect. 4, 6th Ed.; Reid on the Powers of the Human Mind, vol. 1, Essay 3, ch. 5; Cousin, Cours de l'Histoire de la Philosophie, &c. vol. 2, pp. 131 and 389); and, notwithstanding some passages in his Essay, it

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appear to be two kinds of sensation (*d*); 1. The internal sense—the intuitive perception of our own existence and of what is actually passing in our minds. Of all forms of knowledge or persuasion this is the clearest and most indubitable; and is indeed the basis of every other. Descartes and Locke, however different their systems in other respects, agree in this. "Ego cogito, ergo sum" is the celebrated maxim of the former (*e*): "If I doubt of all other things," says the latter (*f*), "that very doubt makes me perceive my own existence, and will not suffer me to doubt of that." "The scepticks," observes Sir Thomas Brown (*g*), "that affirmed they knew nothing, even in that opinion confute themselves, and thought they knew more than all the world besides." And according to a scholastic maxim, "Nihil est in intellectu, quod non fuerit in sensu" (*h*), to which Leibnitz sagaciously adds "nisi ipse intellectus" (*i*). 2. The external sense—the faculty whereby the perception of the presence of external objects is conveyed to the mind through our outward senses (*k*). All our other ideas are formed from the above by the operations

Internal sense.

External sense.

2. Reflexion.

may be a question whether such were not the meaning of Locke himself. In citing that eminent metaphysician, we do not hold ourselves accountable for *all* his views or language, far less for every consequence that may be deduced from them.

(*d*) Bonnier, Traité des Preuves, §§ 6 and 7, 2nd Ed. Locke in loc. cit. § 4, uses "internal sense" to signify "reflexion."

(*e*) Principia Philosophiæ, pars 1, n. 7.

(*f*) Locke on the Human Understanding, bk. 4, ch. 9, § 3.

(*g*) Religio Medici, scct. 55. "Que penser d'un juge qui méconnaîtrait sa propre existence? Mais une pareille supposition est inadmissible. La chicane la plus audacieuse n'oserait soulever de pareils doutes. L'évidence interne est la base de toute certitude judiciaire, comme de toute certitude en général; mais c'est une base incontestée et incontestable." Bonnier, Traité des Preuves, § 19, 2nd Ed.

(*h*) Encyclop. Britan. 1st Dissertation, pp. 113, 114.

(*i*) See his works, vol. 5, p. 359, Genev. 1768.

(*k*) Locke, bk. 2, ch. 1; Bonnier, Traité des Preuves, § 8, 2nd Ed.

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of "reflexion" (*l*); which may be defined, that faculty through which the mind is supplied with ideas by any sort of act or operation of its own, either on ideas received directly through the senses, or on other ideas, either immediately or mediately traceable to ideas so received.

2°. Objects about which the mind is conversant. 1. Relations between ideas.

§ 5. 2°. The human mind is conversant about two classes of objects (*m*). 1. The relations between its ideas (*n*). Under this head come mathematical and such like truths; where it is obvious that the relations of our ideas to each other may be true although there be nothing without the mind corresponding to the ideas within it. The properties of an equilateral triangle or circle, for instance, are equally indisputable whether a perfect equilateral triangle or perfect circle can be found in the universe or not (*o*); and astronomers investigate the curves bodies would describe if acted on by forces which, so far as we are aware, have no patterns in nature (*p*). 2. Real existences: *i.e.* objects existing without the mind corresponding to ideas within it (*q*).

2. Real existences.

(*l*) Locke, bk. 2, ch. 1.

(*m*) *Id.* bk. 4, ch. 1.

(*n*) *Id.* bk. 4, ch. 1, §§ 4, 5, 6.

(*o*) *Id.* bk. 4, ch. 4, § 6; De Morgan on Probabilities, p. 9.

(*p*) It must not however be supposed that mathematical truths have not, like all others, their ultimate basis in experience. As the highest authority we subjoin the following from Sir Isaac Newton's Preface to his immortal work "Philosophiæ Naturalis Principia Mathematica." "Linearum rectarum et circulorum descriptiones, in quibus Geometria fundatur, ad Mechanicam pertinent. Has lineas describere geometria non docet, sed postulat. Postulat enim ut tiro easdem accuratè describere priùs didicerit, quàm limen attingat geometriæ; dein, quomodo per has operationes problemata solvantur, docet; rectas et circulos describere problemata sunt, sed non geometrica. Ex mechanicâ postulatur horum solutio, in geometriâ docetur solutorum usus. Ac gloriatur geometria quòd tam paucis principiis aliundè petitis tam multa præstet. Fundatur igitur Geometria in praxi mechanicâ."

(*q*) Locke, bk. 4, ch. 1, § 7. Perhaps, in order to avoid prejudging a highly metaphysical question, we should say "objects existing, or appearing to our faculties to exist, without the mind, &c."

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§ 6. 3°. With regard to intensity of persuasion; the faculties of the human mind are comprehended in the genera, knowledge and judgment (*r*). 1. By "knowledge," strictly speaking, is meant when we have an actual perception of the agreement or disagreement of any of our ideas (*s*); and it is only to such a perception that the term "certainty" is properly applicable (*t*). Knowledge is *intuitive*, when this agreement or disagreement is perceived immediately by comparison of the ideas themselves: *demonstrative*, when it is only perceived mediately, *i.e.* when it is deduced from a comparison of each with intervening ideas which have a constant and immutable connection with them; as in the case of mathematical truths of which the mind has taken in the proofs. And, lastly, when through the agency of our senses we obtain a perception of the existence of external objects, our knowledge is said to be *sensitive* (*u*). But *knowledge* and *certainty* are constantly used in a secondary sense which it is important not to overlook; viz., as synonymous with settled belief or reasonable conviction: as when we say that such a one received stolen goods *knowing* them to have been stolen; or that we are *certain*, or *morally certain*, of the existence of such a fact, &c. (*x*).

3°. Intensity of persuasion.

1. Knowledge.

Certainty.

§ 7. 2. "Judgment," the other faculty of the mind, though inferior to knowledge in respect of intensity of persuasion, plays quite as important a part in human speculation and action, and, as connected with jurisprudence, demands our attention even more. It is the faculty by which our minds take ideas to agree or disagree, facts or propositions to be true or false, by the aid of intervening ideas whose connexion with them is

2. Judgment.

(*r*) Locke, bk. 4, ch. 14, § 4, and ch. 1, § 7.
(*s*) *Id.* bk. 4, ch. 1, § 2.
(*t*) *Id.* bk. 4, ch. 4, §§ 7, 18.
(*u*) Locke, bk. 4, ch. 2 and 11.
(*x*) Pufendorf, Jus Nat. et Gent. lib. 1, c. 2, § 11; Butler's Analogy of Religion, Introduction.

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Probability.

either not constant and immutable, or is not perceived to be so (*y*). The foundation of this is the *probability* or likelihood of that agreement or disagreement, that truth or falsehood, deduced or *presumed* from its conformity or repugnancy to our knowledge, observation and experience (*z*). Judgment is often based on the testimony of others vouching their observation or experience (*a*); but this is clearly a branch of the former, as our belief in such cases rests on a presumption of the accuracy and veracity of the narrators.

Extensive sphere of.

§ 8. Actual knowledge and certainty extending a comparatively little way, men are compelled to resort to judgment and act on probability in by far the greater number of their speculations, as well as in the transactions of life, both ordinary and extraordinary, trivial and important (*b*). The faculty of judgment is conversant not only about matters of fact, which, falling under the observation of our senses, are capable of being proved by human testimony, but also about the operations of nature, and other things beyond the discovery of our senses (*c*); and thus embraces the enormous class of subjects investigated by analogy and induction (*d*). But here it is important to remark that on the same matter one man may have knowledge and certainty, while another has only judgment and probability: as when a man, either from ignorance of mathematical principles or laziness to go through the proofs, receives a mathematical truth on the testimony of one who comprehends it; in this case he has only got moral evidence

(*y*) Locke, bk. 4, ch. 15, § 1, and ch. 14, § 3.

(*z*) Locke, ch. 15, §§ 3 and 4; ch. 14, s. 4; Butler's Analogy of Religion, Introduction.

(*a*) Locke, ch. 15, § 4.

(*b*) Locke, bk. 4, ch. 14, § 1; Butler's Analogy of Religion, Introduction; 3 Bentham's Judicial Evidence, 351; Gilb. Ev. 3, 4, 4th Ed.

(*c*) Locke, bk. 4, ch. 16, §§ 5 and 12.

(*d*) *Id.* § 12, and Bonnier, Traité des Preuves, §§ 9, *et seq.* 2nd Ed.

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of that truth, while his informant has demonstrative proof (*e*).

Persuasion resulting from.

§ 9. Another great distinction between knowledge and judgment remains to be pointed out. The former is, as we have seen, reducible to three kinds (*f*); but to classify the degrees of persuasion resulting from judgment is wholly beyond human power; for the extent to which facts or propositions may be in conformity with our antecedent knowledge, observation or experience, necessarily varies ad infinitum. An attempt has been made to express some of the shades of judgment by the terms assurance, confidence, confident belief, belief, conjecture, guess, doubt, wavering, distrust, disbelief, &c. (*g*).

Proof.

§ 10. The word PROOF seems properly to mean any thing which serves, either immediately or mediately, to convince the mind of the truth or falsehood of a fact or proposition (*h*); and as truths differ, the proofs adapted to them differ also (*i*). Thus the proofs of a mathematical problem or theorem are the intermediate ideas which form the links in the chain of demonstration: the proofs of any thing established by induction are the facts from which it is inferred, &c.: and the proofs of matters of fact in general are our senses, the testimony of witnesses, documents, and the like. Some authors use the terms "factum probandum" and "factum probans" to designate respectively the fact to be proved and that by which it is proved (*k*). "Proof" is also

(*e*) Locke, bk. 4, ch. 15, § 1; and ch. 14, § 3; 1 Greenl. Evid. § 1, note (1), 7th Ed.

(*f*) *Suprà*, § 6.

(*g*) Locke, bk. 4, ch. 16, §§ 6—9.

(*h*) Domat, Les Lois Civiles dans leur Ordre Naturel, part 1, liv. 3, tit. 6; Bonnier, Traité des Preuves, § 5, 2nd Ed.

(*i*) Domat in loc. cit.

(*k*) 3 Benth. Jud. Ev. 3; Wills, Circ. Ev. 15, 136, 137, 153, 3rd Ed.

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applied to the conviction generated in the mind by proof properly so called (*l*).

Evidence.

§ 11. The word EVIDENCE signifies in its original sense the state of being evident, i. e. plain, apparent or notorious (*m*). But by a beautiful and almost peculiar inflection of our language (*n*) it is applied to that which tends to render evident, or to generate proof. This is the sense in which it is commonly used in our law books, and will be used throughout this work. Evidence, thus understood, has been well defined any matter of fact, the effect, tendency or design of which is to produce in the mind a persuasion, affirmative or disaffirmative, of the existence of some other matter of fact (*o*). The fact sought to be proved is termed "the principal fact:" the fact which tends to establish it, "the evidentiary fact" (*p*). When the chain consists of more than two parts, the intermediate links are principal facts with respect to those below and evidentiary facts with respect to those above them. Such we propose to call "subalternate" principal and evidentiary facts.

Divisions of facts.

§ 12. Confining ourselves henceforward to *truths of*

(*l*) Matthæns de Probationibus, c. 1, N. 1; Huberus, Prælectiones Juris Civilis, lib. 22, tit. 3, n. 2; 1 Greenl. Ev. § 1, 7th Ed.

(*m*) Johns. Dict. The Latin "evidentia," and the French "évidence," are commonly restricted by foreign jurists to those cases where conviction is produced by the testimony of our senses: See Quintilian, Inst. Orat. lib. 6, c. 2; Calvin, Lexic. Jurid.; Steph. Thesaur. Ling. Lat.; Domat, Lois Civiles, part. 1, liv. 3, tit. 6; Bonnier, Traité des Preuves, §§ 6, 8, 9, 82, &c., 2nd Ed. All relating to evidence, as the term is used in English law, is treated of by the Civilians and Canonists under the head "probatio," and by the French writers under that of "preuve."

(*n*) It has the same meaning in Norman French; see int. al. T. 18 Edw. II. 614, tit. Replegg.; 9 Edw. III. 5, 6, pl. 11.

(*o*) 1 Benth. Jud. Ev. 17. "Evidence," Evidentia signifies generally any proof, be it testimony of men, records or writings: Cowel's Interpreter; and Les Termes de la Ley. See Co. Litt. 283, a.

(*p*) 1 Benth. Jud. Ed. 18.

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fact—the proper object of the present treatise—we shall first direct attention to some divisions of them, which, as connected with jurisprudence especially, it will be convenient to bear in mind. In the first place, then, facts are either *physical* or *psychological* (*q*). By "physical facts" is meant such as either have their seat in some inanimate being, or if in an animate then not by virtue of the qualities which constitute it such; while "psychological facts" are those which have their seat in an animate being by virtue of the qualities by which it is constituted animate. Thus; the existence of visible objects, the outward acts of intelligent agents, the res gestæ of a lawsuit, &c., range themselves under the former class: while to the latter belong such as only exist in the mind of an individual; as, for instance, the sensations or recollections of which he is conscious, his intellectual assent to any proposition, the desires or passions by which he is agitated, his animus or intention in doing particular acts, &c. Psychological facts are obviously incapable of direct proof by the testimony of witnesses—their existence can only be ascertained either by confession of the party whose mind is their seat (*r*)—"index animi sermo" (*s*)—or by presumptive inference from physical ones (*t*).

1. Physical and psychological.

§ 13. There are two other divisions of facts which deserve to be noted. One is, that they are either *events* or *states of things* (*u*). By an "event" is meant some motion or change considered as having come about either in the course of nature, or through the agency of human will; in which latter case it is called "an act," or "an action." The fall of a tree is "an event," the

2. Events and states of things.

(*q*) 1 Benth. Jud. Ev. 45.

(*r*) Mascardus de Probationibus, Concl. 309; 1 Benth. Jud. Ev. 82, 145; 3 *Id.* 6.

(*s*) 5 Co. 118 b.

(*t*) Mascard. de Prob. Concl. 94; 1 Benth. Jud. Ev. 82, 145; 3 *Id.* 6.

(*u*) 1 Benth. Jud. Ev. 47.

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3. Positive or affirmative and negative.

existence of the tree is "a state of things;" but both are alike "facts" (*x*). The remaining division of facts is into *positive* or *affirmative* and *negative* (*y*): a distinction which, unlike both the former, does not belong to the nature of the facts themselves, but to that of the discourse which we employ in speaking of them (*z*). The existence of a certain state of things is a positive or affirmative fact, the non-existence of it is a negative fact. But the only really existing facts are positive ones—for a negative fact is nothing more than the non-existence of a positive one; and the non-existence of a negative fact is equivalent to the existence of the correspondent and opposite positive fact (*a*).

Evidence is either ab intrà or ab extrà.

§ 14. Our persuasion of the existence or non-existence of facts has its source, or efficient cause, either in the operation of our own perceptive or intellectual faculties, or in the operation of the like faculties on the part of others, evidenced to us either by discourse or deportment. The former of these may be called evidence ab intrà; the latter, evidence ab extrà (*b*). The immense part which evidence ab extrà bears in forensic procedure, as well as in almost everything else, makes it advisable that we should consider somewhat at large the grounds of belief in human testimony, and the dangers to be avoided when dealing with it.

Natural tendency of the mind to believe human testimony.

§ 15. The existence of a strong tendency in the human mind to accept as true what has been related by others is universally admitted, and confirmed by every day's observation; and it may be laid down as equally certain that one cause of this tendency is our experience of the great preponderance of truth over falsehood in human testimony, taken as a whole. But whether this is the

(*x*) 1 Benth. Jud. Ev. 48.
(*y*) *Id.* 49.
(*z*) *Id.*
(*a*) 1 Benth. Jud. Ev. 49, 50.
(*b*) *Id.* 51, 52.

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sole cause has given rise to difference of opinion. Writers on natural law describe man as endowed by nature with a sort of moral instinct, which prompts him to act in certain cases where vigour and expedition are required, and the faculties of reason and reflection are either immatured, or, if matured, would be too slow (*c*): and most authors think that a tendency to believe the statements of others is to be found among the operations of this instinct. Man, they argue, is so constituted that the knowledge which he can acquire through his personal experience is necessarily very limited, and, unless by some effective provision of nature he were enabled, and indeed compelled, to avail himself of the knowledge and experience of others, the world could neither be governed nor improved. The instinctive character of the tendency in question, they say, appears from the undoubted fact that it is immeasurably strongest in childhood, and diminishes when experience has made us acquainted with falsehood and deception (*d*). Others, however, deny all this (*e*); and it has been urged that the implicit belief so observable in children is owing to their experience being all, or nearly all, on one side—namely, in favour of the truth of what they hear (*f*).

Sanctions of truth.

§ 16. However this may be, it is certain that the enunciation of truth and eloignment of *wilful* falsehood among men in their intercourse with each other, are secured by three guarantees or sanctions—the *natural* sanction, the *moral* or *popular* sanction, and the *religious* sanction (*g*). And, first, of the *natural* sanction. Mutual

1st. The natural sanction.

(*c*) Burlamaqni, Principes du Droit de la Nature et des Gens, pt. 2, ch. 3.

(*d*) 1 Greenl. Ev. § 7, 7th Ed., and the authorities there cited.

(*e*) 1 Benth. Jud. Ev. 127—130; Paley's Moral and Political Philosophy, bk. 1, ch. 5.

(*f*) 1 Benth. Jud. Ev. 129, 130.

(*g*) 1 Benth. Jud. Ev. 198; 5 *Id.* 635, 636. See Bonnier, Traité des Preuves, §§ 220, 221, 222, 2nd Ed. For the reasons stated in the text, we have adopted the phrase "*natural* sanction," nsed by Bonnier,

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confidence between man and man being indispensable to the acquisition of knowledge, the happiness of our race, and indeed to the very existence of society, the great Creator has planted the springs of truth very deep in the human breast. According to Bentham, the natural sanction is altogether physical in its character, arising out of the love of ease,—memory being prompter than invention (*h*). "To relate incidents as they have really happened," he says (*i*), "is the work of the memory: to relate them otherwise than as they have really happened, is the work of the invention. But, generally speaking, comparing the work of the memory with that of the invention, the latter will be found by much the harder work. The ideas presented by the memory present themselves in the first instance, and as it were of their own accord: the ideas presented by the invention, by the imagination, do not present themselves without labour and exertion. In the first instance come the true facts presented by the memory, which facts must be put aside: they are constantly presenting themselves, and as constantly must the door be shut against them. The false facts, for which the imagination is drawn upon, are not to be got at without effort: not only so, but, if, in the search made after them, any at all present themselves, different ones will present themselves for the same place: to the labour of investigation is thus added the labour of selection." It is, however, very doubtful whether this, although true as far as it goes, embraces the full extent of the natural sanction. Bonnier, in his Traité des Preuves (*k*), severely attacks the passages

in preference to "*physical* sanction," used by Bentham. The *legal* or *political* sanction of truth, and *oaths*, which are only an application of the religious sanction, being both artificial in their nature, will be more properly considered in the next Part.

(*h*) 2 Benth. Jud. Ev. 2.

(*i*) 1 Benth. Jud. Ev. 202, 203. See also 1 Stark. Ev. 14, 3rd Ed. & *Id.* 20, 4th Ed.

(*k*) § 221, 2nd Ed. In another place, § 15, 2nd Ed., he says, "S'il y a une tendance naturelle des esprits vers le vrai, comme des

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just quoted, and says that the natural sanction for the veracity of witnesses is to be found in a certain powerful feeling in the human mind which impels man to speak the truth, and makes him do violence to himself whenever he betrays it; that the true and the just are two poles towards which the human mind, when uncorrupted, continually points. And somewhat similar language is used by Lord Bacon (*l*). In another part of the same work, however (*m*), Bentham mentions the *sympathetic* sanction as a branch of the natural one, describing it to be the feeling by which we are deterred from falsehood by regret for the pain and injury which it may cause others. He also considers the imperfection of the natural sanction to consist in its being better calculated to prevent falsehood in toto than to secure circumstantial truth in particulars (*n*); which, taking his definition of that sanction, is no doubt the case.

2nd. The moral sanction.

§ 17. The *moral* sanction may be described in a word. Men having found the advantages of truth and the inconveniences of falsehood in their mutual intercourse, and, perhaps, further actuated by the reflexion that truth is in conformity with the will of God and the laws of nature, have by general consent affixed the brand of disgrace on voluntary departure from it; and hence, as observed by several authors, the infamy attached to the word "liar" (*o*). A great infirmity of the moral sanction is, that deriving, as it does, all its force from the value men set on the opinions of others, it naturally teaches them to conceal their own faults from public view, even at the sacrifice of truth (*p*).

corps vers le centre de la terre, l'homme, étant libre, peut obéir ou ne pas obéir à cette tendance, et il n'arrive que trop souvent que ses déclarations soient mensongères."

(*l*) Essay on Truth.

(*m*) 5 Benth. Jud. Ev. 636.

(*n*) 1 Benth. Jud. Ev. 207, 208.

(*o*) See Pufendorf, Jus Nat. et Gent. lib. 4, cap. 1, § 8; Benth. Jud. Ev. bk. 1, ch. 11, sect. 5, and Lord Bacon's Essay on Truth.

(*p*) 1 Benth. Jud. Ev. 212—216.

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3rd. The religious sanction.

§ 18. Lastly, there is the *religious* sanction; which is founded on the belief that truth is acceptable and falsehood abhorrent to the Governor of the Universe, and that he will, in some way, reward the one and punish the other. All forms of religious belief acknowledge this great principle; and the following argument, among others, has been used to show that it is a precept of *natural* religion. "We are so constituted that obedience to the law of veracity is absolutely necessary to our happiness. Were we to lose either our feeling of obligation to tell the truth, or our disposition to receive as truth whatever is told to us, there would at once be an end to all science and all knowledge, beyond that which every man had obtained by his own personal observation and experience. No man could profit by the discoveries of his contemporaries, much less by the discoveries of those men who have gone before him. Language would be useless, and we should be but little removed from the brutes. Every one must be aware, upon the slightest reflexion, that a community of entire liars could not exist in a state of society. The effects of such a course of conduct upon the whole, show us what is the will of God in the individual case" (*q*). The divine punishment for falsehood being prospective and invisible detracts much from the weight of this sanction, and perjury is often committed by persons whose religious faith cannot be doubted, but who presumptuously hope, either by their subsequent good conduct or some other means, to efface its guilt in the eyes of Heaven.

Powerful influence of them.

§ 19. The effect of these three sanctions is much greater than might at first sight be supposed. They are in continual operation as efficient causes for the production of truth, and rendering its enunciation natural and habitual to men; while every incentive to falsehood can only be looked upon as a species of disturbing force,

(*q*) Wayland's Elements of Moral Science, p. 272, London. See also a paper by Addison, in the "Spectator," No. 507.

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which acts occasionally and exceptionally. Of few persons indeed can it be said that their adherence to truth is undeviating at all times; with many its observance appears to depend on circumstance, accident, or caprice; with some the practice of lying seems inveterate; while certain classes of persons systematically, and as it were on principle, withhold the truth from other classes on particular subjects. But after every abatement has been made for aberrations, the quantity of truth daily spoken immeasurably exceeds that of falsehood (*r*); and Bentham even goes so far as to assert, that "from the mouth of the most egregious liar that ever existed, truth must have issued at least a hundred times for once that wilful falsehood has taken its place"(*s*).

Sometimes produce falsehood instead of truth.

§ 20. It is however of the utmost importance to observe that any of those springs of action which we have denominated "sanctions of truth," may be found on the wrong side, *i. e.* producing falsehood instead of truth. If the natural sanction rests solely on a love of ease, that love, while it represses the invention of false facts, equally prevents the taxing the memory to give a perfect narrative of what has been witnessed; and if supposed to spring from a love of truth and justice, the party called on to give evidence may consider the ends of *justice* advanced by withholding the *truth;* as, for instance, where the disclosing it will induce the condemnation of a criminal whose prosecution, though strictly legal, he deems morally unjust, or whose future good behaviour he thinks will be better ensured by

(*r*) Bonnier, Traité des Preuves, § 15, 2nd Ed.

(*s*) 5 Benth. Jud. Ev. 82. We have read somewhere of a country, the inhabitants of which purposely and systematically gave false answers to all questions respecting its topography. Still a traveller was enabled to obtain the information he wished for respecting it, by questioning them upon incidental and collateral facts, when, the truth naturally oozing out, supplied him with materials for arriving at the knowledge sought.

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escape than punishment. But of the sanctions in question, none is so frequently divided against itself as the moral. Conduct condemned by one portion of society is often applauded by the rest, and persons desirous of the good opinion of certain classes are often satisfied to attain it at the cost of sinking themselves in that of others, and tell or suppress the truth as may best advance that object. "The credibility of a witness," says the Marquis Beccaria (*t*), "may be in some degree lessened when he is member of some private society, whose usages and maxims are either not well known, or different from those of the public. Such a man has not only his own passions but those of other people." Even the religious sanction has been enlisted in the cause of falsehood. Particular forms of religion allow it in certain cases (*u*), and the truth has often been sacrificed by religious persons in order to avoid bringing scandal on their creeds.

Credit due to human testimony.

§ 21. The credit due to human testimony, assuming that we correctly understand the language employed, is the compound ratio of the witness's means of acquaintance with what he narrates and of his intention to narrate it truly (*x*). In estimating the latter, three things are to be attended to. 1. Whether he labours

1°. Intention of witness to narrate truly.

(*t*) "La credibilità di un testimonio può essere alcune volte sminnita, quando egli sia membro di alcuna società privata, di cui gli usi e le massime sieno o non ben conosciute, o diverse dalle pubbliche. Un tal uomo ha non solo le proprie, ma le altrui passioni." —Beccaria, Dei Delitti e delle Pene, § 8.

(*u*) See Halhed's Code of Gentoo Laws, &c., cited *infrà*, bk. 2, pt. 1, ch. 2. Whether a violation of truth is allowable in any, and if so, in what cases, has been much considered by moralists and divines. See Pufendorf, Jus Natur. et Gent. lib. 4, cap. 1, §§ 7 *et seq.*; Bentham's Jud. Ev. bk. 1, c. 11, sect. 5; Paley's Moral and Political Philosophy, bk. 3, pt. 1, ch. 15, &c.; and bk. 1, ch. 5. It is however universally agreed that the obligation to tell truth is the rule; the licence to falsehood, if such exists, the exception.

(*x*) See *infrà*, § 73, and notes.

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under any interest or bias, which may sway him to pervert the truth. 2. His veracity on former occasions—evidenced either by our own experience or credible proof. 3. His manner and deportment in delivering his testimony. "Interrogabit judex," says one of the canonists (*y*), "testes in quâlibet causâ, eosque diligenter examinabit, de singulis circumstantiis diligenter inquirans, de causis videlicet, de personis, loco, tempore, visu, auditu, scientiâ, credulitate, famâ, et certitudine, cæterisque, quæ ad rem facere, et negotio convenire existimabit. Illud quoque subtiliter animadvertere non omittet, quo vultu, quâ constantiâ, quâve animi trepidatione testes deponant; cùm interdum ex his, vel ipsis invitis testibus, magis quàm ex verborum serie rerum veritas elucescat." "A consideration of the demeanour of the witness upon the trial," says one of our books (*z*), "and of the manner of giving his evidence, both in chief and upon cross-examination, is oftentimes not less material than the testimony itself. An overforward and hasty zeal on the part of the witness in giving testimony which will benefit the party whose witness he is, his exaggeration of circumstances, his reluctance in giving adverse evidence, his slowness in answering, his evasive replies, his affectation of not hearing or not understanding the question, for the purpose of gaining time to consider the effect of his answer; precipitancy in answering, without waiting to hear or to understand the nature of the question; his inability to detail any circumstances wherein, if his testimony were untrue, he would be open to contradiction, or his forwardness in minutely detailing those where he knows contradiction to be impossible; an affectation of indifference; are all to a greater or less extent obvious marks of insincerity. On the other hand, his promptness and frankness in answering questions

(*y*) Lancelottus, Institutiones Juris Canonici, lib. 3, tit. 14, §§ 11, 12.

(*z*) 1 Stark. Ev. 547, 3rd Ed.; *Id.* 822, 823, 4th Ed.

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without regard to consequences, and especially his unhesitating readiness in stating all the circumstances attending the transaction, by which he opens a wide field for contradiction if his testimony be false, are, as well as numerous others of a similar nature, strong internal indications of his sincerity." This, however, must be taken with some qualification. "A witness," says a modern writer (*a*), "may be very honest, although his demeanour is, in some respects, open to censure, and deserves rebuke. Constitution of mind, habit, manner of life, may give him a coarse, blunt tongue, and a manner in appearance, yet not meant to be, uncivil or disrespectful. Such a rough, unrefined, nature or carriage may well consist with a habit of speaking the truth, with an abhorrence of falsehood, and a wish and determination to give true evidence. . . . . Demeanour consisting in confusion, embarrassment, hesitation in replying to questions, and even vacillating or contradictory answers, are not necessarily a proof of dishonesty in a witness, because this deportment may arise from bashfulness, or timidity, and may be the natural and inevitable effect of an examination by a skilful, practised, perhaps unscrupulous, advocate, whose aim in his questions is, to entangle, entrap and stupify the witness, and cause him to say and unsay anything or everything. It may not be good behaviour in a witness, to suffer his eyes to wander about the court while he is under examination, but this conduct may not be unnatural in the midst perhaps of an entirely new scene to him; and the distraction of mind occasioned by that employment of his eyes may well cause him, on returning to his duty, to answer hastily, and without consideration. But in all this there may be no intentional disrespect to the court; and the witness notwithstanding may be a very honest one. Again, it happens to all persons occasionally, without thought to use one word for another,

(*a*) Ram on Facts, pp. 183—4.

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making the sense very different from what was intended: unconsciously we say that we did not mean to say. In like manner, a witness may inadvertently contradict himself."

2°. Capacity of witness.

§ 22. The capacity of a party to give a faithful account of things depends on—1. The opportunities he has had of observing the matters he narrates. 2. His powers, either natural or acquired, of perception and observation; and here it is important to ascertain whether he is a discreet, sober-minded person, or imaginative and imbued with a love of the marvellous, and also whether he lies under any bias likely to distort his judgment. 3. Whether the circumstances he narrates were likely to attract his attention, in consequence of their importance, either intrinsically or with relation to himself. "Where the chemist and the physician see a dangerous poison, the kitchen-maid may see nothing more than an immaterial flaw in one of her pans, the cook may behold an innocent means of recommending herself to the palate through the medium of the eye. Where the botanist sees a rare, and perhaps new, plant, the husbandman sees a weed: where the mineralogist sees a new ore, pregnant with some new metal, the labourer sees a lump of dirt, not distinguishable from the rest, unless it be by being heavier and more troublesome"(*b*). 4. His memory; and here, whether the transaction is ancient or recent, whether his recollection has been refreshed by memorandum, conversation, &c.

Concurrent and conflicting testimonies.

§ 23. The probative force arising from concurrent testimonies is the compound result of the probabilities of the testimonies taken singly(*c*). But when testimonies conflict or clash with each other, we must form the best conclusion we can as to their *relative* values.

(*b*) 1 Benth. Jud. Ev. 164—5. (*c*) See *infrà*, § 73, and notes.

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Things to be considered when weighing testimony.
1. Consistency of the narration.
2. Possibility and probability of the matters related.

§ 24. There are two things which must never be lost sight of when weighing testimony of any kind. 1. The consistency of the different parts of the narration. 2. The possibility or probability, the impossibility or improbability, of the matters related: which afford a sort of corroborative or counter-evidence of those matters. By probability, as already observed (*d*), is meant the likelihood of any thing to be true, deduced from its conformity to our knowledge, observation and experience. When a supposed fact is so repugnant to the laws of nature, assumed for this purpose to be fixed and immutable (*e*), that no amount of evidence could induce us to believe it, such supposed fact is said to be *impossible*, or *physically* impossible. There is likewise *moral* impossibility, which, however, is nothing more than a high degree of improbability.

§ 25. As the knowledge, observation and experience of men vary in every imaginable degree, their notions of possibility and probability might naturally be expected to differ; and we continually find that not only are the most opposite judgments formed as to the credence due to alleged facts, but that a fact which one man considers both possible and probable another holds to be physically impossible (*f*). With respect to this kind of impossibility, our notions will be more or less

(*d*) *Suprà*, § 7.

(*e*) The judicial proceedings of modern times are conducted on the assumption that the laws of nature are fixed and immutable; not from disbelief in miraculous interposition, but because such interposition is unquestionably rare; and it would be dangerous in the highest degree if tribunals were allowed to adopt its supposed occurrence as a principle of decision.

(*f*) He may even *know* it to be so: *e. g.*—A plausible but fallacious chain of presumptive evidence tends to indicate A. as the person who committed a crime at B. His guilt may seem probable to C.; but D., E. and F. know that it is impossible, for at the moment the crime was perpetrated they were at G., and saw A. there.

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accurate according to our acquaintance with the laws of nature; for many phenomena in apparent violation of her laws have been found, on examination, to be the regular consequences of others previously unknown. The story of the king of Siam has often been quoted, who believed everything the Dutch ambassador told him about Europe, until he mentioned that the water there in winter became so hard that men, horses, and even an elephant, could walk on it, which that monarch at once pronounced a palpable falsehood (*g*). About three centuries and a half ago, when Columbus declared his conviction that the East Indies could be reached by sailing westward, and offered to make the trial, the learned world was prepared to demonstrate its *physical impossibility* (*h*); while similar language has, in our own day, been applied to the project for effecting the passage of the Atlantic Ocean by steam. So the assertion that England could be crossed in a carriage travelling at the rate of sixty miles an hour; or that a message could, with the speed of lightning, be transmitted through many miles of sea, at the depth of twenty or thirty fathoms, would, for many ages past, by the great bulk of mankind at least, have been pronounced a lie too gross to require confutation; and the bare suggestion that a message might be transmitted in like manner from one shore of the Atlantic to the other, would either have consigned a man to confinement as a hopeless lunatic, or sent him to the stake as an emissary of the powers of darkness. And, lastly, different persons may consider the same thing possible, or even probable, for very opposite reasons. In the infancy of aërostation, when its attempts were watched with anxiety by the learned and ridicule by the ignorant, some Japanese,

(*g*) Locke, bk. 4, ch. 15, § 5.

(*h*) See the Life of Columbus, by Washington Irving, vol. i. bk. 2. ch. 4. A curious fac-simile of the map of the world, as during the middle ages it was supposed to exist, is given in Miller's Testimony of the Rocks, p. 363.

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on seeing a balloon ascend at St. Petersburg, expressed no surprise whatever; and being asked the cause of their unconcern, said it was nothing but magic, and in Japan they had practitioners in magic in abundance (*i*).

Misrepresentation, incompleteness and exaggeration.

§ 26. Before dismissing this subject, it is to be observed, that falsehood in human testimony presents itself much more frequently in the shape of misrepresentation, incompleteness, or exaggeration, than of total fabrication (*j*). "Qui non liberè veritatem pronunciat, proditor veritatis est" (*k*). A lie is never half so dangerous as when it is woven up with some indisputable verity; and hence the use of the comprehensive form of oath administered in English courts of justice, that the deposing witness is to tell "the truth, the whole truth, and nothing but the truth." So, an extensive field of mischief is opened by mere exaggeration: for "as truth is made the groundwork of the picture, and fiction lends but light and shade, it often requires more patience and acuteness than most men possess, or are willing to exercise, to distinguish fact from fancy, and to repaint the narrative in its proper colours. In short, the intermixture of truth disarms the suspicion of the candid, and sanctions the ready belief of the malevolent" (*l*).

(*i*) 3 Benth. Jud. Ev. 315. The Chapter on Improbability and Impossibility in Bentham's work on Judicial Evidence—bk. 5, ch. 16—though an unfinished sketch, and by no means free from error, will repay perusal.

(*j*) This is particularly the case when *words* are repeated. "Il tuono, il gesto, tutte ciò che precede e ciò che siegue, le differenti idee che gli uomini attacano alle stesse parole, alterano e modificano in manièra i detti di un' uomo, che è quasi impossibile il repreterle quali precisamente furono dette. Di più, le azioni violente, e fuori dell' uso ordinario, quali sono i veri delitti, lasciano traccia di se nella moltitudine delle circonstanze, e negli effetti che ne derivano &c.: ma le parole non rimangono che nella memoria, per lo più infedele, e spesso sedotta, degli ascoltanti. Egli è adunque di gran lunga più facile una calunnia sulle parole che sulle azioni di un uomo."—Beccaria, Dei Delitti e delle Pene, § 8.

(*k*) 11 Co. 83 a; 4 Inst. Epil.

(*l*) Tayl. Evid. § 46, 5th Ed., and Lectures there cited.

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§ 27. There are several divisions of evidence which, although in some degree arbitrary, it will be found useful to bear in mind. In the first place, then, evidence is either *direct* or *indirect;* according as the principal fact follows from the evidentiary,—the *factum probandum* from the *factum probans*—immediately or by inference (*m*). In jurisprudence, however, direct evidence is commonly used in a secondary sense, viz. as limited to cases where the principal fact, or *factum probandum*, is attested directly by witnesses, things or documents (*n*). Indirect evidence, known in forensic procedure by the name of "circumstantial evidence" (*o*), is either conclusive or presumptive; *conclusive*, where the connection between the principal and evidentiary facts—the *factum probandum* and *factum probans*—is a necessary consequence of the laws of nature; *presumptive*, where it only rests on a greater or less degree of probability (*p*). In practice this latter is termed

Divisions of evidence.

1°. Direct and indirect evidence.

1. Direct evidence.

2. Indirect or circumstantial evidence.

Conclusive.

Presumptive.

(*m*) "Prima quidem illa partitio ab Aristotele tradita, consensum ferè omnium meruit, alias esse probationes quas extrà dicendi rationem acciperet orator; alias quas ex causâ traheret ipse, et quodammodo gigneret. Ideoque illas ἀντέχνους, id est *inartificiales;* has ἐντέχνους, id est *artificiales* vocaverunt:" Quintil. Inst. Orat. lib. 5, c. 1. See also Heinec. ad Pand. pars 4, § 116.

(*n*) "Omnis nostra probatio aut directa est aut obliqua. Directa cum id quod probare volumus ipsis tabulis aut testimoniis continetur. Obliqua cum id quod intendimus ex tabulis aut testimoniis argumentando colligitur:" Vinnius, Jurispr. Contract. lib. 4, c. 25. See also 1 Stark. Evidence, 15, 3rd Ed.; and *Id.* 21, 4th Ed.

(*o*) It may be doubted whether these terms are, strictly speaking, synonymous. Circumstantial evidence is that species of indirect evidence which municipal law deems sufficiently proximate to form the basis of judicial decision. Where, for instance, philosophical or historical truths are established by remote inference or analogy from facts, the evidence of those truths is *indirect*, but can scarcely be called *circumstantial.*

(*p*) "Dividuntur (signa) in has primas duas species, quod eorum alia sunt quæ *necessaria* sunt, quæ Græci vocant τεκμήρια; alia non necessaria, quæ σημεῖα. Priora illa sunt quæ aliter habere se non possunt * * * Alia sunt signa non necessaria, quæ εἰκότα Græci vocant:" Quintil. Inst. Orat. lib. 5, c. 9. Some editions have εἰκαῖα instead of εἰκότα.

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"presumptive evidence;" obviously a secondary sense of the word: for direct evidence is in truth only presumptive, seeing that it rests on a presumption of the accuracy and veracity of witnesses, things or documents (*q*).

2°. Real and personal evidence.

§ 28. Again, evidence is either *real* or *personal* (*r*). By *real* evidence is meant evidence of which any object belonging to the class of *things* is the source, *persons* also included in respect of such properties as belong to them in common with things (*s*). This sort of evidence may be either *immediate*, where the thing comes under the cognizance of our senses; or *reported*, where its existence is related to us by others. *Personal* evidence is that which is afforded by a human agent; either in the way of discourse, or by voluntary signs. Evidence supplied by observation of *involuntary* changes of countenance and deportment comes under the head of real evidence (*t*).

3°. Original and derivative evidence.

§ 29. The next division of evidence deserves particular attention, both for its own sake, and because it will be found to run through the whole system of English forensic procedure (*u*). It is this, that all evidence is either *original* or *unoriginal*. By *original* evidence is meant evidence, either ab intrà or ab extrà, which has an independent probative force of its own; *unoriginal*, also called *derivative*, *transmitted* or *secondhand* evidence, is that which derives its force from, through, or under, some other. And of this derivative evidence there are five forms. 1. When supposed oral evidence

Forms of derivative evidence.

(*q*) *Suprà*, § 7.

(*r*) 1 Benth. Jud. Ev. 53.

(*s*) 3 Benth. Jud. Ev. 26; and 1 *Id.* 53. This is the "evidentia rci vel facti" of the civilians. Mascard. de Prob. Quæst. 8; Calv. Lexic. Jurid.; 1 Hagg. Cons. Rep. 105. See *infrà*, bk. 2, pt. 2.

(*t*) We have slightly deviated from the definition given in 1 Benth. Jud. Ev. 53, 54.

(*u*) See bk. 1, pt. 1, and bk. 3, pt. 2, ch. 3 and 4.

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is delivered through oral: this is *hearsay* evidence, in the strict and primary sense of the term. 2. When supposed written evidence is delivered through written. 3. When supposed oral evidence is delivered through written. 4. When supposed written evidence is delivered through oral. 5. When real evidence is *reported*, either by word of mouth or otherwise (*x*).

Infirmity of derivative evidence.

§ 30. The infirmity of derivative evidence as compared with its primary source will be apparent on the slightest reflexion. Take the most obvious case,—supposed oral evidence delivered through oral. A. deposes that B. told him that he witnessed a certain fact. If B. were the deposing witness there would be only two chances of error in believing his testimony: viz. that he may have been mistaken as to what he thought he witnessed; or, that his narrative may be intentionally false. But when his testimony comes to us *obstetricante manu* (*y*), through the relation of A., two fresh chances of error are introduced: viz. that A. may have either mistaken the words uttered by B., or may intend to misrepresent them. There is indeed an additional, although weak, chance of obtaining the truth through double falsehood or mistake. E. g., the question is, at a certain time was X. at a certain place. A. was there and saw him; but intending to deceive B., tells him he was not. B. believes this; but with the intention of deceiving, says to C., that A. told him that X. was there. In relying on this supposed statement of A., vouched by B., C. has got the truth (*z*). It is perhaps superfluous to add, that the danger increases the greater the number of media through which evidence has come; for with

(*x*) See 3 Benth. Jud. Ev. 396.

(*y*) This expression is to be found in the Vulgate, Job, xxvi. 13: "Spiritus ejus ornavit cœlos, & *obstetricante manu* ejus eductus est coluber tortuosus." See also Exod. i. 16: "Quando *obstetricabitis* Hebræas, &c."

(*z*) See Lacroix, Calcul des Probabilités, § 142.

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each additional witness, or other medium, two fresh chances of error are introduced (*a*).

4°. Pre-appointed and casual evidence.

§ 31. We shall notice one other division, the value of which has been too much overlooked. Evidence is either *pre-appointed* (*b*), otherwise called *pre-constituted* (*c*), or *casual* (*d*). *Pre-appointed* evidence is defined by Bentham, in one place (*e*), to be where "the creation or preservation of an article of evidence has been, either to public or private minds, an object of solicitude, and thence a final cause of arrangement taken in consequence, (viz., in the view of its serving to give effect to a right, or enforce an obligation, on some future contingent occasion); the evidence so created and preserved comes under the notion of *pre-appointed* evidence." In another place (*f*) he speaks of it as *written* evidence, created with the design of being employed on the occasion and for the purpose of some suit, or cause, not individually determined. Under this head come public documents: such as records, registers, &c.: together with deeds, wills, contracts and other instruments for the facilitating of proof on future occasions; which are drawn up by individuals either in compliance with the positive requirements of law, or with a view to the convenience of themselves or others. But it is a mistake to assume that this kind of evidence must necessarily be in a *written* form (*g*). When a party about to do a deliberate act calls particular persons to witness, in order that they may be able to bear testimony to it on

(*a*) For the proof of historical facts by derivative evidence, see the second Part of this Introduction.

(*b*) "Pre-appointed evidence;" 1 Benth. Jud. Ev. 56; 2 *Id.* 435.

(*c*) "Preuves Préconstituées;" Bonnier, Traité des Preuves, §§ 97 and 379, 2nd Ed.; and part. 2, liv. 2.

(*d*) "Casual Evidence," Bentham's Rationale of Evidence, &c., App. A., ch. 8.

(*e*) 2 Benth. Jud. Ev. 435.

(*f*) 1 *Id.* 56.

(*g*) See Bonnier, Traité des Preuves, §§ 379, 380, 2nd Ed.

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future occasions, their evidence is *pre-appointed* or *pre-constituted*, as much as a deed which professes to be made *in witness* of the matters which it contains. There are several instances in the Anglo-Saxon laws, where sales were required to be made in the presence of particular classes of persons, or in particular places (*h*). A nuncupative will under the 29 Car. 2, c. 3, s. 19, was not good unless the testator "bid the persons present, or some of them, bear witness that such was his will, &c." (*i*); and the 2 & 3 Will. 4, c. 75, s. 8, enacts that any person may "either in writing at any time during his life, or verbally in the presence of two or more witnesses during the illness whereof he died, direct that his body after death be examined anatomically, &c." (*k*). Any evidence not coming under the head of "pre-appointed evidence" may be denominated "casual evidence" (*l*).

(*h*) See those collected in 1 Greenl. Ev. § 262, note (4), 7th Ed.

(*i*) See now 7 Will. 4 & 1 Vict. c. 26, s. 11.

(*k*) The direction given in Matth. xviii. 15, 16, seems a clear case of unwritten pre-appointed evidence: "If thy brother shall trespass against thee, go and tell him his fault, &c. But if he will not hear thee, then take with thee one or two more, that in the mouth of two or three witnesses every word may be established." See also Genesis, xxiii. 17, 18.

(*l*) "Casual Evidence," Bentham's Rationale of Evidence, &c. App. A., ch. 8.

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PART II.

JUDICIAL EVIDENCE.

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Judicial evidence.

§ 32. HAVING considered the subject of evidence apart from jurisprudence and judicature, for the sake of distinction termed "natural" or "moral evidence;" we proceed to that of "JUDICIAL EVIDENCE," which is a species of the former, with the view of showing its essential difference and characteristics.

Definition.

§ 33. "Judicial evidence" may be defined the evidence received by courts of justice in proof or disproof of *facts*, the existence of which comes in question before them. By *facts* here must be understood the res gestæ of some suit, or other matter, to which when ascertained the law is to be applied; for although in logical accuracy the existence or non-existence of a *law* is a question of fact, it is rarely spoken of as such, either by jurists or practitioners (*a*). By "law" here we mean the general law of each country, which its tribunals are bound to know without proof; for they are not bound, at least in general, to take judicial cognizance of local customs (*b*) or the laws of foreign nations (*c*)—the existence of both of which must be proved as facts.

(*a*) Voet. ad Pand. lib. 22, tit. 3, n. 8; Hnberus, Præl. Jur. Civ. lib. 22, tit. 3, n. 7; Vinnius, Jnrispr. Contr. lib. 4, cap. 25; Bonnier, Traité des Prenves, §§ 2 and 23, 2nd Ed. See also Co. Litt. 283 a; 1 Stark. Ev. 9, 3rd Ed., and 12, 4th Ed.

(*b*) Heinec. ad Pand. Pars 4, § 119; *Id.*, Pars 1, § 103; Co. Litt. 115 b; 175 b; Tayl. Ev. § 5, 5th Ed.

(*c*) Story, Confl. Laws, § 637, *et seq.* 5th Ed.; Ph. and Am. Ev. 624; Tayl. Ev. § 5, 5th Ed.

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Its rules either exclusionary or investitive.

§ 34. Judicial evidence, as already observed, is a species of the genus "evidence;" and is for the most part nothing more than natural evidence restrained or modified by rules of positive law (*d*). Some of these rules are of an *exclusionary* nature, and reject as *legal* evidence facts in themselves entitled to consideration. Others again are what may be called *investitive, i. e.* investing natural evidence with an artificial weight; and even in some instances, attributing the property of evidence to that which abstractedly speaking has no probative force at all.

Necessity and use of.

§ 35. And here the question presents itself, whence the necessity, whence the utility of such rules? Doubtful and disputed facts, it may be said, forming the subject-matter about which natural and judicial evidence are alike conversant, and truth being ever one and the same, must not any rules shackling the minds of tribunals in its investigation be a useless, if not mischievous, adjunct to laws? On examination however it will appear that a system of judicial proof is not only highly salutary and useful, but that an absolute necessity for it arises out of the very nature of municipal law and the functions of tribunals, and that some such system is to be found among the legal institutions of every country, we think we may say, without a single exception.

(*d*) "Probatio est actus *judicialis*, quo de facto dubio fides fit judici." Heinec. ad Pand. pars 4, § 115. "Probatio est intentionis nostræ *legitima* fides, quam judici facit aut actor, aut reus." Matth. de Prob. c. 1, n. 1. See also Voet. ad Pand. lib. 22, tit. 3, n. 1. "Probatio est ostensio rei dubiæ per *legitimos modos* judici facienda, in causis apud ipsum judicem controversis, &c. Nec in definitione omisi 'per legitimos modos,' hac de causâ, quia multi sunt modi, ex quibus fit probatio, ut per testes, per instrumenta, per evidentiam facti, per justam præsumptionem, per conjecturam, et per multos alios modos, &c. Ea enim ratione dixi *legitimos*, ut ostenderem hujusmodi probationes *juxta legis normam* debere fieri in hujusmodi probationibus observatam, hoc est secundum formam libelli, secundum quam pronuntiandum est ex allegatis:" Mascardus de Prob. Quæst. 2, n. 17, 21, 22, 23.

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§ 36. The evidence adduced in courts of justice, being as it were a handmaid to jurisprudence, might reasonably be expected to partake of the nature and follow the law of the science to which it is ancillary. And this impression is confirmed, not removed, by a closer examination of the subject; for it will be found that the same reasons which give birth to municipal law itself, show the necessity for some authoritative regulation of the proofs resorted to in its administration. But in order to set this in a clear light, we must point attention to a distinction often overlooked, and the losing sight of which has been the source of much mistake and confusion. According to writers on natural law, justice is divided into *expletive* and *attributive* (*e*). By the former —sometimes also denominated rigorous justice, perfect justice, or justice properly so called—is meant that whereby we discharge to another duties to which he is entitled by virtue of a perfect and rigorous obligation, the performance of which, if withheld, he has a right to exact by force. The latter consists in the discharge of duties arising out of an imperfect or non-rigorous obligation, the performance of which cannot be so exacted, but is left to each person's honour and conscience. These are comprehended under the appellations of humanity, charity, benevolence, &c. (*f*). Under a sys-

A handmaid to jurisprudence.

Expletive and attributive justice.

(*e*) Burlamaqui, Principes du Droit de la Nature et des Gens, pt. 1, ch. xi. § 11; Grotius, De Jur. Bell. ac Pac. lib. 1, cap. 1, § viii. "Facultatem respicit justitia expletrix, aptitudinem respicit attributrix:" Grot. in loc.

(*f*) An excellent example of the difference between these two kinds of justice is afforded by the well known anecdote of Cyrus, recorded by Xenophon, Cyrop. lib. 1, c. 3, and quoted by Grotius, in loc. cit. A big boy having a coat that was too small for him, and a little boy one that was too large for him, the big boy by force and against the will of the little one effected an exchange of coats; and Cyrus being appealed to, adjudged that he was right. But the master said this decision was wrong—for the question was not which coat was best suited to each boy, but to which did the disputed coat belong—in other words Cyrus had proceeded to administer *attributive* justice, when his jurisdiction

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tem of municipal jurisprudence, expletive justice must be understood to mean that which may be claimed of strict legal right; and attributive justice that which tribunals can either not notice at all, or only in virtue of an equitable jurisdiction modifying and restraining the rigour of the law.

Origin of municipal law.

§ 37. So soon as societies were formed and the relations of sovereignty and subjection established, the imperfections of our nature indicated the necessity for municipal law. To administer perfect *attributive* justice, in all questions to which the innumerable combinations of human action give rise, is the high prerogative of Omniscience and Impeccability. For to this end are required not only an unclouded view of the facts as they have occurred, and a decision, alike unerring and uncorrupted, on the claims of the contending parties; but a complete foresight of all the consequences, both direct and collateral, and down to their remotest ramifications, which will follow from that decision. The hopelessness of ever accomplishing this became early visible to the reflecting portion of mankind; and the observation of nature (*g*) having taught them that great ends are best attained by the steady operation of fixed *general* laws, they conceived the notion of framing *general rules* for the government of society—rules based on the principle of securing the largest amount of truth and happiness in the largest number of cases, however their undeviating

only extended to *expletive*. The passages in the Mosaic law, "Ye shall do no unrighteousness in judgment: thou shalt not respect the person of the poor, nor honour the person of the mighty; but in righteousness shalt thou judge thy neighbour:" Lev. xix. 15, and also Exod. xxiii. 3, are likewise cited in illustration of this principle, which is amply supported by other passages of Scripture. See Deut. i. 17; xvi. 19; Prov. xviii. 5; xxiv. 23; xxviii. 21; John, vii. 24.

(*g*) "Le ley imitate nature." Per Doddridge, J., in *Sheffeild* v. *Ratcliffe*, 2 Rol. R. 502. Sicut Natura non facit saltum, ita nec Lex; Co. Litt. 238 b. See also Co. Litt. 79 a; Jenk. Cent. 1, Case 30; Hob. 144.

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action may violate attributive justice or work injury in particular instances (*h*). The rules established by au-

(*h*) The finest *description* of municipal law to be found in any language, is that of Demosthenes, in his first Oration against Aristogiton: quoted in Christian's edition of Blackstone's Comm. vol. i. p. 44, note: "Οἱ δὲ νόμοι τὸ δίκαιον καὶ τὸ καλὸν καὶ τὸ συμφέρον βούλονται, καὶ τοῦτο ζητοῦσι· καὶ ἐπειδὰν εὑρεθῇ, κοινὸν τοῦτο πρὸς ἅπαντα ἀπεδείχθη, πᾶσιν ἴσον καὶ ὅμοιον· καὶ τοῦτ' ἔστι νόμος, ᾧ πάντας προσήκει πείθεσθαι διὰ πολλά, καὶ μάλισθ', ὅτι πᾶς ἐστι νόμος εὕρημα μὲν καὶ δῶρον θεῶν, δόγμα δ' ἀνθρώπων φρονίμων, ἐπανόρθωμα δε των ἑκουσίων καὶ ἀκουσίων ἁμαρτημάτων, πόλεως δὲ συνθήκη κοινὴ, καθ' ἣν πᾶσι προσήκει ζῆν τοῖς ἐν τῇ πόλει." The following, taken from the works of Isidore, Bishop of Seville, Etymol. lib. ii. c. 10, is also worthy of notice:—"Erit autem lex, honesta, justa, possibilis, secundùm naturam, secundùm consuetudinem patriæ, loco temporique conveniens, necessaria, utilis, manifesta quoque ne aliquid per obscuritatem in captionem contineat, nullo privato commodo, sed pro communi civium utilitate conscripta." See also Dig. lib. 1, t. 3, ll. 3 and 10; lib. 50, t. 17, l. 64. Our common law authorities are strong to the same effect.—"Ad ea quæ frequentiùs accidunt jura adaptantur:" Co. Litt. 238 a; 2 Inst. 137; 5 Co. 127 b; 6 Co. 77 a. —"Le ley est reasonable que provide pur le multitude, coment que ascun especial person ont perd' p c̃. Vix ulla lex fieri potest quæ omnibus commoda sit, sed si majori parti pspiciat, utilis est." Plowd. 369. "There hardly exists," says Lord Ellenborough, in *R.* v. *The Inhabitants of Harringworth*, 4 M. & Sel. 350, "a general rule, out of which does not grow, or may be stated to grow, some possible inconvenience from a strict observance of it. Nevertheless, the convenience of having certain fixed rules, which is far above any other consideration, has induced courts of justice to adopt them, without canvassing every particular inconvenience which ingenuity may suggest as likely to be derived from their application." In P. 2 H. IV. 18 B. pl. 6 (cited in the note to *Burgess* v. *Gray*, 1 C. B. 586), the counsel for a defendant in the C. P. argued thus:—"This defendant is undone and impoverished for ever, if this action is maintained against him, for then twenty other such suits will be brought against him upon the like matter." Whereupon Thirning, C. J., interposed—"What is that to us? It is better that he should be quite undone than that the law should be changed for him." And, lastly, we would refer to the case of the Prohibitions del Roy in 12 Co. 63, M. 5 Jac. I. The archbishop had informed the king that he had a personal jurisdiction in ecclesiastical matters, which Sir Edward Coke, answering for himself and the rest of the judges, denied; saying, that the king in his own person cannot adjudge any case, but that it ought to be determined and adjudged in some court of justice, according

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thority for this purpose in each country constitute its municipal law.

The principles which give birth to municipal law applicable to judicial evidence.

1. Necessity for limiting the discretion of tribunals in determining facts.

§ 38. The reasons for applying these principles of legislation to evidence received in courts of justice, although less obvious, are equally satisfactory with those which originated the principles themselves. In the first place then we would observe, that the relations of cause and effect are manifestly innumerable; especially when those cases are taken into the account where the effect does not follow immediately from its ultimate cause, and is only the mediate consequence of some subalternate one. Now "Optima est lex, quæ minimum relinquit arbitrio judicis" (*i*): but the power of a tribunal, however nicely defined by rules of substantive law, would soon be found absolute in reality if no restraint were imposed on its discretion in declaring facts proved or disproved; and we accordingly find that the laws of every well-governed state have established rules regulating the quality, and occasionally the quantity, of the evidence necessary to form the basis of judicial decision. And here the analogy to the other branches of municipal law seems complete. The exclusion of evidence by virtue of a general rule may in particular instances exclude the truth, and so work injustice; but the mischief is immeasurably compensated by the stability which the general operation of the rule

to the law and custom of England, &c. &c. "Then," continues the report, p. 64, "the king said, that he thought the law was founded upon reason, and that he and others had reason, as well as the judges: to which it was answered by me, that true it was, that God had endowed his majesty with excellent science, and great endowments of nature; but his majesty was not learned in the laws of his realm of England, and causes which concern the life, or inheritance, or goods, or fortunes of his subjects, are not to be decided by natural reason, but by the artificial reason and judgment of law, which law is an art which requires long study and experience, before that a man can attain to the cognizance of it; &c."

(*i*) Bac. de Augm. Scient. lib. 8, c. 3, tit. 1, Aphorism. 46.

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confers on the rights of men, and the feeling of security generated in their minds by the conviction that they can be divested of them only by the authority of law, and not at the pleasure of a tribunal. The two principal checks which the law of England imposes on its tribunals in this respect are, first, the prohibiting judges and jurymen from deciding *facts* on their own personal knowledge, and placing them as it were in a state of legal ignorance as to almost everything relating to the matters in question except what is established before them by evidence (*k*). Its maxim is, "Non refert quid notum sit judici, si notum non sit in formâ judicii" (*l*): and the principles, "De non apparentibus et non existentibus eadem est ratio" (*m*), "Idem est non esse et non apparere" (*n*), "Quod non apparet non est" (*o*), "Incerta pro nullis habentur" (*p*), &c., so false in philosophy, become perfectly true in our jurisprudence. The second is, the exacting as a condition precedent even to the *reception* of evidence, that there be an open and visible connexion between the principal and evidentiary facts,—"Nemo tenetur divinare" (*q*)—"Probationes debent esse evidentes, (id est) perspicuæ et faciles intelligi" (*r*). This indeed is only following out

(*k*) 7 H. IV. 41, pl. 5; Plowd. 83; 1 Leon. 161. See the anthorities in the following notes; and *infrà*, bk. 1, pt. 1. The canonists seem to have been somewhat loose in this respect. See Decret. Greg. IX. lib. 5, tit. 1, l. 9; Calvin, Lex Jurid. voc. "Notorium;" Gibert, Corpus Jur. Canon Proleg. Pars Post. tit. 7, cap. 2, § 2, N. ix., and Devotus, Inst. Jur. Can. lib. 3, tit. 14, § 10, not. 1.

(*l*) 3 Bnlst. 115. "Nous ne poiomous pas aler a jugement sur notorie chose, eins selonque ce que le proces est devant nous mesmes." Per Herle, C. J., H. 7 Edw. III. 4 A. pl. 7.

(*m*) 4 Co. 47a; 5 Co. v. b.; 12 *Id.* 53, 134; 3 Bulst. 110; Hob. 295; 1 T. R. 404; 7 M. & W. 437; 10 Bingh. 47; 6 Bingh. N. C. 539; 7 M. & W. 437.

(*n*) Jenk. Cent. 5, Cas. 36.

(*o*) 2 Inst. 479.

(*p*) Davys, 33; Lofft, M. 555; Broom's Max. xxvii. 3rd Ed.

(*q*) 4 Co. 28 a, and 66 b; 10 Co. 55 a. See also Bac. Max. sub reg. 3; Litt. R. 98; Lofft, M. 559.

(*r*) Co. Litt. 283 a.

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a great principle which runs through our whole law—"In jure non remota causa, sed proxima spectatur" (*s*). One or two instances will illustrate. If things are traced up to their ultimate sources, the remote though *chief* cause of the appearance of a criminal at the bar might be found in his parents, his education, the example of others, the law itself, or even the very judge by whom he is tried; still the tribunal cannot enter upon such matters, and must only look at the *proximate* cause—his own act. So, the non-payment of a debt has for its proximate cause the debtor's neglect, but the ultimate cause may be the default of others whose duty, either legally or morally, it was to have supplied him with money.

Difference between public and domestic jurisdiction.

§ 39. And here must be noticed a false principle which is to be found in some systems of jurisprudence, and runs through Bentham's work on judicial evidence —viz. the assumption that there is a perfect, or even close analogy between justice administered by a parent in his family and justice administered by municipal tribunals between man and man. "Before states existed" (*t*), says the eminent writer just quoted, "at least in any of the forms now in existence in civilized nations, families existed. Justice is not less necessary to the existence of families than of states. The mode in which, in those domestic tribunals, created by nature at the instance of necessity, justice was administered, and, for that purpose, facts were inquired into, may for distinction's sake, be termed the *natural* or domestic mode of judicature. It is among the characteristics of the natural or domestic mode of judicature, to be exercised, (if not absolutely, at least comparatively speaking) without forms: without rules. A man judges, as Monsieur

(*s*) Bac. Max. of the Law, Reg. 1; 12 East, 652; 14 M. & W. 483; 18 C. B. 379; 18 Jurist, 962; 6 B. & S. 881; H. & R. 61. See *infrà*, bk. 1, pt. 1.

(*t*) 4 Benth. Jud. Ev. 7, 8.

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Jourdan talked prose, unconscious of any science displayed, of any art exercised. One of your two sons leaves his task undone, and tears his brother's clothes: both brothers claim the same plaything: two of your servants dispute to whose place it belongs to do a given piece of work. You animadvert upon these delinquencies, you settle these disputes: it scarce occurs to you that the study in which you have been sitting to hear this, is a tribunal, a court; your elbow chair a bench; yourself a judge. Yet you could no more perform these several operations without performing the task of judicature, without exercising the functions of a judge, without hearing evidence, without making inquiry, than if the subject of inquiry had been the Hastings cause, the Douglas cause, or the Literary Property cause." From all this he draws the conclusion that courts of *summary* jurisdiction are courts of natural procedure (*u*), and very superior both in theory and practice to the ordinary and regular tribunals. Under the former he reckons courts of request, courts of conscience, courts martial, and summary proceedings before justices of the peace, &c.; and not only lavishly praises them in many passages of his work on Judicial Evidence (*x*); but in a work published in 1790, when speaking of this country, assures the French nation, that "Imagination cannot conceive, nor heart desire, greater integrity than has been uniformly displayed for ages by courts composed of single judges, without juries, under the auspices of publicity, though in a state of dependance on the crown" (*y*).

§ 40. Now we have no wish to discuss the merits of these tribunals, further than to observe that courts of

(*u*) 4 Benth. Jud. Ev. 8—12.

(*x*) See *inter al.*, vol. ii. pp. 28, 29; vol. iv. pp. 327, 352, 355, 356, 357, 405, 430, 431, 432, 437—439, 443, 628.

(*y*) Draft of a New Plan for the Organization of the Judicial Establishment in France, March, 1790, ch. 2, tit. 2, p. 7.

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requests and courts of conscience have been superseded by a jurisdiction of a very superior kind, introduced by 9 & 10 Vict. c. 95; and that we really are not aware that courts martial, at least in general, are conducted *without forms*. But the fallacy of the reasoning on which the praise of summary tribunals is founded arises from losing sight of the great principle, that the essence of all rules of municipal law, adjective as well as substantive, consists in their *generality*. The observation is as old as the days of Aristotle, that a commonwealth is not to be confounded with a family, as though a large family were nothing different from a small commonwealth (*z*); and a very little reflexion will show the difference between them. The parent in his family administers a kind of *attributive* justice. Both by natural and municipal law he is invested with, comparatively speaking, an absolute power over his children: this is indispensably necessary to guide the conduct and form the characters of those in whom reason and experience are almost a blank; and the feeling of parental affection is so strong that this power may in general be safely entrusted to him. But the case is quite different with a sovereign, or judge, governing for the common welfare a set of beings of matured intellect like himself. A pure unlimited monarchy is unquestionably the natural and primitive form of government, but does it thence follow that it is the best at the present day, and that all others ought to be extirpated? On the other hand, how absurd would it be to argue that because a constitutional monarchy is an excellent form of government for a country, each private individual should establish one in his family! The very statement of these propositions is their refutation; and yet it is the same sort of reasoning which would infer that pre-established forms are useless in public judicial investi-

(*z*) Aristotle's Politics, bk. 1, ch. 1.

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gations, because they would be useless, or worse, in foro domestico.

2. Necessity for the speedy action of tribunals.

§ 41. Again; the duty of a judicial tribunal in dealing with facts is not limited to the abstract question of their existence; for whether materials for definite judgment or belief respecting it are forthcoming or not a *decision* must be given, to be followed by speedy, if not immediate action. Questions of philosophy, whether natural or moral, as well as questions of history, rest for the most part in speculation, and may be undertaken, dropped, and renewed at pleasure or convenience. Whether, for instance, the law of gravitation extends beyond the solar system; whether there is any determinate law of relation between the magnitudes of the planets and their distances from the sun; whether the motion of each of what are inaccurately termed fixed stars is independent or only forms part of some gigantic system, are at present matters for investigation lying open to men in general: and the astronomer who considers that the materials before him are insufficient to warrant his forming a positive opinion on any of these subjects may suspend his judgment, in the hope that the observation of additional phenomena, or an improved analysis, or both combined, will disclose the truth to more fortunate generations. So, whether the army with which Xerxes invaded Greece consisted of thousands or millions of men; whether Cæsar was implicated in the Catalinarian conspiracy; whether King Richard III. murdered his nephews: and a host of such like, are questions the solution of which may be deferred, or even pronounced impossible, without in the least affecting the rights of individuals or the peace and good order of society. In the general course of every-day life, also, we are rarely compelled to *act* on mere conjectures, and commonly remain passive as long as possible in the hope of procuring satisfactory evidence to confirm or

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Interest reipublicæ ut sit finis litium.

dissipate them. But *judicial* inquiries differ widely from all these. "Interest (or "expedit") reipublicæ ut sit finis litium"(*a*): "Ne lites immortales essent dum litigantes mortales sunt"(*b*). The plaintiff and defendant stand before the tribunal, and both individual and social interests require from it a decision, and that too a speedy decision, one way or the other. It will not do for the judge to say, "This matter seems doubtful, I suspend my judgment," and dismiss it; to be renewed indefinitely from time to time; keeping alive all the annoyance and irritation of a law suit; holding out to each of the parties a manifest temptation to fabricate evidence in order to turn the scale in his favour; and injuring the community by distracting the attention of at least two of its members from the exercise of more useful avocations. All this, however, is very different from adjourning a court for a definite time, for the purposes of justice (*c*).

Rules for the disposal of matters of fact necessary to tribunals.

§ 42. The duty of the legislator, therefore, is not discharged by framing substantive laws and establishing forms of judicial procedure; in order to do complete justice he must go farther, and supply rules for the guidance of tribunals in the *disposal* of all matters of fact which come before them, whatever the nature of the inquiry, or however difficult or even impossible it may be to get at the real truth. In such straights, barbarism and ignorance either decide at haphazard in each particular instance, or dogmatically lay down unbending rules to be applied in all cases, or invoke the aid of superstition—sometimes, as in the trials by ordeal which have prevailed both in the ancient and modern world, and in the judicial combats of the middle ages, audaciously and impiously calling on Heaven to vindicate

(*a*) 4 Blackst. Com. 338; Co. Litt. 103 a, 303 b; 6 Co. 9 a, and 45 a; 11 *Id.* 69 a; 3 H. & N. 647.

(*b*) Voet. ad Pand. lib. 5, tit. 1, n. 53; 17 C. B. 140, per Willes, J.

(*c*) 17 & 18 Vict. c. 125, s. 19.

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the injured party by a miracle; and at others, as in the old system of canonical purgation and the wager of law of our ancestors, unwarrantably assuming that the truth will be extracted by the oath of the party who is most strongly interested in its concealment (*d*). On the other hand, the laws of countries where the true principles

(*d*) A very good account of these is given by Bonnier, in his Traité des Preuves, §§ 745—750, 2nd Ed. See also 4 Blackst. Comm. ch. 27; Devotus, Inst. Jur. Can. Lib. 3, tit. 9, § 26, not. (3), and § 30, in notis, and Gibbon's Decline and Fall of the Roman Empire, ch. 38. Besides the absurdity and impiety of these presumptuous appeals to miraculous interposition, there can be little doubt that the danger of them was often evaded by management, so as to be more apparent than real. The following curious instance of this, taken from an ancient ecclesiastical authority, is given in the Law Magazine, N. S. vol. i. p. 8. After a long dispute between a Catholic deacon and an Arian, on the merits of their respective creeds, the Catholic says, "Quid longis sermocinationum intentionibus fatigamur? Factis rei veritas adprobetur. Succendatur igni æneus et in ferventi aquâ annulus cujusdam projiciatur; qui vero eum ex ferventi undâ sustulerit, ille justitiam consequi comprobatur, quo facto pars diversa ad cognitionem hujus justitiæ convertatur." The Arian agrees. "Circa horam tertiam in foro conveniunt, concurrit populus ad spectaculum, accenditur ignis, æneus superponitur, fervet valde, annulus in undâ ferventi projicitur." The Catholic invites the Arian to plunge his arm first into the seething water; the latter declines the first trial, urging the Catholic, as the challenger, to begin. The Catholic bares his arm, but the Arian beholding it smeared with oil exclaims that a fraud is intended, on which Jacinthus, another Catholic deacon, happening accidentally (of course) to pass that way, inquires into the cause of strife. The issue is thus related: "Nec moratus, extracto a vestimentis brachio in æneum dexteram mergit. *Annulus enim*, qui ejectus fuerat, *erat valde levis ac parvulus*, nec minus ferebatur ab undâ quam vento possit ferri vel palea. Quem diu multumque quæsitum, *infra unius horæ spatium reperit.* Accendebatur interea vehementer focus ille sub dosio, quo validius fervens non facile adsequi possit annulus a manu quærentis, extractumque tandem nihil sensit diaconus in carne suâ, sed potius protestatur in imo quidem frigidum esse æneum, in summitate vero calorem teporis modici continentem. Quod cernens hæreticus, valde confusus, injecit audax manum in æneo, dicens: præstabit mihi hæc fides mea. Injectâ manu, protinus usque ad ipsa ossium internodia omnis caro liquefacta defluxit; et sic altercatio finem fecit."

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Rules regulating the burden of proof.

of jurisprudence are understood meet the difficulty by establishing rules to regulate the burden of proof; or, most usually, to speak with strict accuracy, by attaching an artifical weight to the natural principles by which the burden of proof is governed. This has been well explained by a foreign jurist, in language of which the following is a translation (*e*). "The determining to what extent a certain known element renders probable the existence of such or such an unknown cause, governed, as it necessarily is, by the light of reason, in general depends wholly on the discrimination of the judge. But in the most important cases the law, desirous of insuring the stability of certain positions, and of cutting short certain controversies, has established PRESUMPTIONS, to which the judge is obliged to conform." And in another place (*f*), "It is not always

Legal presumptions.

(*e*) Bonnier, Traité des Preuves, § 710, 2nd Ed. We subjoin the original. "La question de savoir jusqu'à quel point tel élément connu rend vraisemblable l'existence de telle ou telle cause inconnue, subordonnée par sa nature aux lumières de la raison, dépend en général uniquement de l'appréciation du juge. Mais, dans les cas les plus importants, la loi, voulant assurer la stabilité de certaines positions, et couper court à certaines controverses, a établi des présomptions auxquelles le juge est obligé de se conformer."

(*f*) Id. §§ 733, 734, 2nd Ed. "Il n'est pas toujours possible à l'homme d'arriver à la connaissance parfaite de la vérité dans chaque cas particulier, et cependant les nécessités sociales ne lui permettent pas toujours de suspendre son jugement et de s'abstenir. La stabilité de l'état des personnes, celles des propriétés, enfin le besoin de calme et de sécurité pour une foule d'intérêts précieux, obligent le législateur à tenir pour vrais un grand nombre de points, qui ne sont pas démontrés, mais dont l'existence est établie par une induction plus ou moins puissante. L'ordre politique, comme l'ordre social, ne repose que sur des présomptions légales. L'aptitude à exercer certains droits, à remplir certaines fonctions, ne se reconnaît qu'au moyen de certaines conditions déterminées *à priori*, une vérification spéciale pour chaque individu étant évidemment impraticable. Plus les relations sociales se compliquent, plus il devient nécessaire de multiplier ces présomptions. * * * Les motifs qui ont déterminé le législateur à établir telle ou telle présomption, tiennent le plus souvent au droit bien plus qu'au fait. Ce qu'il examine surtout, ce n'est pas si le fait connu réunit tous les

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possible for man to arrive at a perfect knowledge of the truth in each particular case, and yet social necessities do not always allow him to suspend his judgment and refrain. The stability of the state of person and property, in a word, the want of peace and security for a multitude of precious interests, compel the legislator to hold as true a great number of points which are not demonstrated, but whose existence is established by an induction more or less cogent. Political order, like social order, rests only on legal presumptions. The capacity of exercising certain rights, discharging certain functions, can be recognized only through the medium of certain conditions determined *à priori, a special verification for each individual instance being evidently impracticable.* The more social relations become complicated, the more it becomes necessary to multiply these presumptions. * * * The motives which have induced the legislator to establish such or such a presumption much more frequently belong to law than to fact. What he chiefly considers is, not whether the known fact combines all the characteristics requisite to render the unknown fact probable, but solely whether social interest requires that from the proof of the one the existence of the other ought to be inferred." And an eminent judge of our own observed in one case (*g*), "The laws of evidence as to what is receivable or not, are founded on a compound consideration of what abstractedly considered is calculated to throw light on the subject in dispute, and of what is practicable. Perhaps if we lived to the age of a thousand years, instead of sixty or seventy, it might throw light on any subject that came into dispute if all matters which could by possibility affect it were severally gone into; and in-

caractères suffisants pour rendre probable le fait inconnu, mais seulement si l'intérêt social exige que l'on conclue de la constatation de l'un à l'existence de l'autre."

(*g*) Rolfe, B., in *The Attorney-General* v. *Hitchcock*, T., 10 Vict. 11 Jurist, 478, 482.

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quiries carried on from month to month as to the truth of everything connected with it. I do not say how that would be, but such a course is found to be impossible at present."

Different kinds of.

§ 43. These *legal* presumptions (*h*) are of two kinds. In most of them the law assumes the existence of something until it is disproved by evidence—called by the civilians *præsumptiones juris*, or *præsumptiones juris tantùm;* and likewise, by English lawyers, inconclusive or rebuttable presumptions. In others, although these are much fewer in number, the presumption is absolute and conclusive, so that no counter-evidence will be received to displace it. These are called *præsumptiones juris et de jure*—a species of presumption correctly defined, "Dispositio legis aliquid præsumentis, et super præsumpto, tanquam sibi comperto, statuentis" (*i*). To this class belong the contract to pay which the law implies from the purchase of goods; the intent to kill or do grievous bodily harm implied from the administration of poison, using deadly weapons, &c. Some may be considered as belonging to universal jurisprudence; the principal of which are the presumption of right derived from the continued and peaceable possession of property, and the presumption upholding the decisions of courts of competent jurisdiction. We have already alluded to the maxim "Interest reipublicæ ut sit finis litium" (*k*); to which must be added, "Vigilantibus et non dormientibus jura subveniunt" (*l*), and "Ex diuturnitate temporis omnia præsumuntur solenniter esse acta" (*m*). If undisturbed possession for a

(*h*) There are presumptions of *fact* as well as presumptions of *law*. See *suprà*, Part 1, §§ 7 and 27, and *infrà*, bk. 3, pt. 2, ch. 2.

(*i*) Alciatus de Præsumptionibus, pars 2, n. 3; Menochius de Præsumptionibus, lib. 1, Quæst. 3, n. 17; 1 Ev. Poth. § 807.

(*k*) *Suprà*, § 41.

(*l*) 2 Co. 26 b; 4 *Id.* 10 b; 82 b; Hob. 347; 2 B. & P. 412; 5 C. B. 74.

(*m*) Co. Litt. 6 b; Jenk. Cent. 1, Cas. 91.

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very long time had not a conclusive effect, the most valuable rights would not only be made the continual subject of dispute, but be liable to be divested or overthrown when the original evidences of the title to them become lost or decayed by time (*n*); and accordingly, among the various ways in which property may be acquired, we find both writers on natural law and the positive codes of nations recognizing that of "prescription," *i. e.* uninterrupted user or possession for a period longer or shorter (*o*).

§ 44. So, it would be productive of the greatest inconvenience and mischief if after a cause, civil or criminal, has been solemnly determined by a court of competent and final jurisdiction, the parties could renew the controversy at pleasure, on the ground either of alleged error in the decision, or the real or pretended discovery of fresh arguments or better evidence. The slightest reflexion will show that if *some* point were not established at which judicial proceedings must stop, no one could ever feel secure in the enjoyment of his life, liberty or property; while unjust, obstinate and quarrelsome persons, especially such as are possessed of wealth or power, would have society at their mercy, and soon convert it into one vast scene of litigation, disturbance and ill will. The great principle of the *finality* of judi-

(*n*) "If time," says Lord Plunket, "destroys the evidence of title, the laws have wisely and humanely made length of possession a substitute for that which has been destroyed. He comes with his scythe in one hand to mow down the muniments of our rights; but in his other hand the lawgiver has placed an hourglass, by which he metes out incessantly those portions of duration which render needless the evidence that he has swept away."—*Lord Brougham's Historical Sketches of Statesmen, &c.* vol. 2, p. 39, note—*Life of C. J. Bushe.*

(*o*) Grotius de Jur. Bell. ac Pac. lib. 2, c. 4; Pufendorf, Jus Nat. et Gent. lib. 4, c. 12; Dig. lib. 41, tit. 3; Cod. lib. 7, tit. 33; 2 Blackst. Comm. ch. 17; Co. Litt. 113, 114; 1 Greenl. Ev. § 17, 7th Ed.; Grand Coustumier de Normendie, ch. 125; Poth. Obl. part. 3, ch. 8; Cod. Civil. liv. 3, tit. 20.

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cial decision is universally recognized, and has been expressed in the various forms—"Res judicata pro veritate accipitur" (*p*); "Judicium pro veritate accipitur" (*q*); "Interest reipublicæ res judicatas non rescindi" (*r*); "Præsumitur pro justitiâ sententiæ" (*s*); "Sententia facit jus" (*t*); "Infinitum in jure reprobatur" (*u*); "Nemo debet pro unâ causâ bis vexari" (*x*), &c.

§ 45. We will merely add one other instance, which places this matter in the strongest light. If the abstract question were proposed, "What is the most *unjust* thing that could be done?" the answer probably would be, "The punishing a man for disobeying a law with the existence of which he was not acquainted." And yet that must constantly occur everywhere; there being no rule of jurisprudence more universal than this, that every person in a country must be conclusively presumed to know its laws sufficiently to be able to regulate his conduct by them (*y*),—"Ignorantia juris, quod quisque tenetur scire, neminem excusat" (*z*). Hard as this may seem, it is indispensably necessary in order to prevent infinitely greater evils; for the allowing violations of the criminal or contraventions of the civil code to pass without punishment or inconvenience, under the plea of ignorance of their provisions, would render

(*p*) Dig. lib. 50, tit. 17, l. 207; Mascard. de Prob. Concl. 1237, n. 13; 1 Ev. Poth. part. 4, ch. 3, sect. 3, art. 3, § 37; Co. Litt. 103 a; and 186 a; n. (3), by Hargr.

(*q*) Co. Litt. 39 a, 168 a, 236 b; 2 Inst. 380.

(*r*) 2 Inst. 360.

(*s*) Mascard. de Prob. Concl. 1237, n. 2. See 3 Bulst. 42, 43.

(*t*) Ellesm. Postn. 55.

(*u*) 2 Inst. 340; 6 Co. 45 a; 8 *Id.* 168 b; 12 Co. 24; Hob. 159; Jenk. Cent. 2, Cas. 15; Cent. 4, Cas. 2 and 46; and Cent. 8, Cas. 29.

(*x*) Jenk. Cent. 1, Cas. 38; 5 Co. 61 a.

(*y*) Dig. lib. 22, tit. 6, l. 9; Heinec. ad Pand. Pars 4, § 146; Sext. Decretal. lib. 5, tit. 12, De Reg. Jur. R. 13; Doctor and Student, Dial. 1, c. 26; Dial. 2, cc. 16, 46; Plowd. 342, 343; 1 Co. 177 b; 2 Co. 3 b; 6 Co. 54 a; 1 Hale, P. C. 42; 7 Car. & P. 456.

(*z*) 4 Blackst. C. 27.

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the whole body of jurisprudence practically worthless. If none were amenable to the laws but those who could be proved acquainted with them, not only would ignorance be continually pleaded, in criminal cases especially, but persons would naturally avoid acquiring a knowledge which carried such perilous consequences along with it.

Abuse of artificial presumptions.

§ 46. But if artificial presumptions have their use, they have likewise their abuse. In unenlightened times, or in the hands of a corrupt tribunal, they are most dangerous instruments; and even in the best times, and by the best tribunals, require to be handled with discretion. Some very absurd and mischievous presumptions of this kind are to be found in the works of the civilians (*a*), as well as in the laws of modern France (*b*); and in this country juries have been frequently advised, if not directed, by judges to presume the grossest absurdities under colour of advancing justice (*c*). A well known instance of an extremely violent and harsh presumption is to be found in the statute 21 Jac. 1, c. 27; by which it was enacted, that every woman delivered of bastard issue, who should endeavour privately, either by drowning or secret burying, or in any other way, to conceal the death thereof, so that it might not come to light whether it were born alive or not, should be deemed to have murdered it, unless she proved it to have been born dead. This cruel enactment, which seems to have been copied from an edict of Hen. II. of France in 1556 (*d*), the principle of which is also to be

(*a*) See Struvius, Syntagma Juris Civilis, by Müller, Exercit. 28, § xviii., note (ζ). "Idem dico," says Bartolus, "si aliquis deprehenditur in domo alicujus, ubi pulchra mulier est, certè facit hunc adulterium manifestum:" Comment. in 2dam part. Dig. Nov. 111 b, Edit. Lugd. 1581.

(*b*) See Bonnier, Traité des Preuves, § 752, *et seq.* 2nd Ed.

(*c*) See *infrà*, bk. 3, pt. 2, ch. 2.

(*d*) Domat, Lois Civiles, part. 1, liv. 3, tit. 6; Préambule, note (*a*); and *Id.* sect. 4, § 2, note (*b*).

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found in the laws of some other countries (*e*), has been repealed by the 43 Geo. 3, c. 58, s. 3. The conclusive effect formerly ascribed to the confessions of accused persons (*f*), and to attempts by flight to escape judicial inquiry (*g*), are likewise among the most general instances.

Evidence excluded on the grounds of vexation, expense and delay.

§ 47. There are some exclusionary rules connected with this branch of the subject, the absolute necessity for which it would require extreme hardihood to deny. We mean where evidence is excluded on the ground that its production would cause needless vexation, expense or delay (*h*). In illustration of the two former, the following case has been put (*i*). "By laying a barrow full of rubbish on a spot on which it ought not to have been laid, (the side of a turnpike road,) Titius has incurred a penalty of 5*s*. No man was witness to the transaction but Sempronius; and, in the station of writer, Sempronius is gone to make his fortune in the East Indies. Should Sempronius be forced, if he could be forced, to come back from the East Indies for the chance of subjecting Titius to this penalty? Who would think of subjecting Sempronius to the vexation? Who would think of subjecting Sempronius, or anybody else, to the expense?" Again, while the liberty of adducing evidence to support his cause ought to be most freely conceded to every litigant—"Facultas probationum non est angustanda" (*k*)—that liberty might be so grossly abused as to stop the administration of justice; and a power in all tribunals to restrain it within due bounds

(*e*) 4 Blackst. Comm. 198.

(*f*) See bk. 3, pt. 2, c. 7.

(*g*) See bk. 3, pt. 2, c. 2.

(*h*) Bentham, whose work on Judicial Evidence is a professed attack on artificial systems of proof in general, admits that the most legitimate evidence may be rightly rejected on these grounds, even at the risk of doing injustice. See vol. i. p. 31; vol. iv. p. 115; and bk. 9, pt. 2, cc. 1, 2, 3, 4.

(*i*) 4 Benth. Jud. Ev. 479, 480.

(*k*) 4 Inst. 279. See also Cod. lib. i. tit. 5, l. 21, vers. fin.

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is consequently as essential to the proper discharge of their functions as the right of expunging surplusage in forensic documents, and restraining prolixity in pleading. "Excessus in re qualibet jure reprobatur communi"(*l*). Suppose a man sued for a debt, or an injurious act of the simplest and most ordinary kind, were to pretend that he required for his defence the evidence of some hundreds of witnesses living in remote and different parts of the world, a court is surely not bound to take his word or his oath for the truth of this, or even for his bona fides in asserting it. Accordingly in the judicial practice of this country a commission or mandamus to examine witnesses will be refused, or terms will be imposed on the party making the application, if the judges think, in their discretion, that the application for it is made with a view to vexation or delay, or with any other sinister or improper motive (*m*). So, we apprehend, a power, (to be exercised with great caution no doubt,) is vested in every tribunal of refusing to hear evidence obviously tendered for such purposes (*n*). "Quanquam," says the Digest (*o*), "quibusdam legibus amplissimus numerus testium definitus sit: tamen ex constitutionibus Principum hæc licentia ad sufficientem numerum testium coarctetur, ut judices moderentur, et eum solum nume-

(*l*) 2 Inst. 232 and 107; 11 Co. 44.

(*m*) *Pirie* v. *Iron*, 8 Bingh. 143; *Brydges* v. *Fisher*, 4 M. & Scott, 458; *Sparkes* v. *Barrett*, 5 Scott, 402; *De Rossi* v. *Polhill*, 7 Scott, 836; *Dalton* v. *Lloyd*, 1 Gale, 102; *Summers* v. *Rawson*, 3 Jur. 288; *Castelli* v. *Groom*, 16 Jur. 888, &c.

(*n*) In the Irish State Trials of 1843, the defendants were indicted for a seditions conspiracy, and among the overt acts were laid the holding in different parts of that kingdom what were called "monster meetings," i.e. meetings at each of which several hundreds of thonsands of persons were present. In order to prevent the case ever getting to the jury, it was, as we are informed, suggested to the defendants, that under pretence of showing that those meetings were not of a seditions character, they might call as witnesses every one of the persons present at them. This dishonourable mode of defence was not resorted to; but suppose it had been, must the court and jury have submitted to it?

(*o*) Dig. lib. 22, tit. 5, l. 1, § 2.

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rum testium, quem necessarium esse putaverint, evocari patiantur; ne effrenatâ potestate ad vexandos homines superflua multitudo testium protrahatur." Still in all these cases the evidence offered might really be relevant and important, and injustice done by its rejection.

§ 48. The lawgivers of some countries, sensible of the evils that may be occasioned by malpractices like the above, have, in endeavouring to suppress them, run into positive absurdity. We allude to the practice of limiting by law the number of witnesses that may be called in proof of each fact in dispute (*p*); without regard to the nature of the cause, the probity of the witnesses, the quantity of evidence given by them, or their manner of delivering their testimony—things which it would obviously be impossible to define by any rule laid down beforehand.

3. In framing rules of judicial proof the consequences of decisions must be looked to.

§ 49. Another marked feature by which judicial proof is distinguished from other forms of proof is, that the legislator by whom its rules are framed must look beyond the contending parties in each case, and weigh the consequences to society which may follow from the decisions of tribunals. Thus the mischiefs which arise from a blameable passiveness in the law are not usually so great as those which spring from its misguided action. For instance, the condemnation and punishment of an innocent man for a supposed crime and the acquittal of a guilty one are, philosophically speaking, only modes of misdecision, diverging equally from the

(*p*) 5 Benth. Jud. Ev. 521; Domat, Lois Civiles, part. 1, liv. 3, tit. 6, sect. 3, § xvi. Note (*x*), vers. fin.; Devot. Inst. Canon. lib. 3, tit. 9, § 9; Decretal. Greg. IX. lib. 2, tit. 20, c. 37. "To any given fact or question, (*fait* (fact), French; *pregunta* (question), Spanish), thirty witnesses were and are allowed by Spanish law; ten only are, or at least were, allowed in French law. Are both right? One French witness, then, is equal to three Spanish ones." Benth. in loc. cit.

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truth. But a very little reflexion will show that, taken with their consequences, the former is an incalculably greater evil: and the legislators and jurists of almost every age and country have recognized the principle,—however violated in practice,—that, although the punishment of guilt and the protection of innocence have in general an equal claim in the administration of justice, the latter should be the primary care of the law, and consequently that in matters of doubt it is safer to acquit than condemn (*q*). Again, the laws of every

(*q*) See the following authorities, the number of which might be almost indefinitely increased: Deut. xvii. 4, 6; Dig. lib. 48, tit. 19, l. 5; Cod. lib. 4, tit. 19, l. 25; Grotius, Jus Bell. ac Pac. lib. 2, cap. 23, § v, n. 1; Huberus, Præl. Jur. Civ. lib. 22, tit. 3, N.N. 4 & 16; Voet. ad Pand. lib. 22, tit. 3, N. 18; Matth. de Prob. cap. 2, N. 20; Mascard. de Prob. Concl. 36, 496, 497; Sanchez de Matrimonio, lib. 10, Dispnt. 12, N.N. 40, 41; Mirror of Justices, ch. 5, sect. 1; Abus, 108, N. 15; T. 18 Ed. II. 620, Nota 1; Fortesc. de Land. cap. 27; 3 Inst. 210; 2 Hale, P. C. 289, 290; 4 Blackst. Com. 358; 1 Stark. Ev. 559, 573, 574, 588, 3rd Ed.; Mac Nally's Evid. 578, 580; Burnett's Crim. Law of Scotland, 522, 523; Dickson, Ev. in Scot. 162, 163; 1 Greenl. Ev. §§ 13 a and 34, 7th Ed.; Burrill, Circ. Ev. 58, 59; D'Aguesseau, "Fragment sur les Preuves en matière Criminelle;" Beccaria, Dei Delitti e delle Pene, § 7. To these may be added even the Chinese Law, if we may rely on a work entitled "The Chinese," by J. F. Davis, vol. 1, p. 394, A.D. 1836, comprised in "The Library of Entertaining Knowledge." It is worthy of observation, that although, as appears from some of the above references, the principle in question was fully recognized by the civilians and canonists, they reversed the rule in those cases where innocence chiefly requires protection; and their maxim, "In atrocissimis leviores conjecturæ sufficiunt, et licet judici jura transgredi:" Beccaria, Dei Delitti e delle Pene, § 8, in not.; see also Mascard. de Prob. Concl. 1392, N. 13; Burnett's Crim. Law of Scotland, 612—will remain a lasting monument of the barbarity as well as the imbecility of its framers. Nor are these merely the notions of bye-gone ages. In a very recent treatise on the canon law is the following passage:—"Plus præstant præsumptiones in causis civilibus, quam in criminalibus, in quibus nemo ex solis conjecturis, etiam vehementibus, condemnandus est; excepto crimine hæreseos, cujus suspectus tanquam hæreticus condemnatur, nisi omnem suspicionem excusserit:" Devotus, Instit. Canon. vol. 2, p. 116, Paris. 1852. Superiorum facultate. The English

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country suppress much evidence that would be relevant or even conclusive, where its reception would involve

law goes farther in the opposite direction than that of most other countries, for it lays down as a maxim, that it is better several guilty persons should escape than that one innocent person should suffer; 2 Hale, P. C. 289; 4 Blackst. Com. 358; the salutary fruit of which is, that in no part of the world is genuine voluntary evidence against suspected criminals more easily procured than in England; the persuasion being general throughout society that if a suspected man be really innocent, the law will take care that no harm shall happen to him. The principles on which this noble and politic maxim rests are not, however, generally understood. The strongest proof of this is to be found in the singular fact of its having been formally attacked by the celebrated Dr. Paley, in his "Moral and Political Philosophy," bk. 6, ch. 9, who designates it a popular maxim having a considerable influence in producing injudicious acquittals, and argues thus against it. "The security of civil life, which is essential to the value and the enjoyment of every blessing it contains, and the interruption of which is followed by universal misery and confusion, is protected chiefly by the dread of punishment. The misfortune of an individual, for such may the sufferings, or even the death, of an innocent person be called, when they are occasioned by no evil intention, cannot be placed in competition with this object. * * * When certain rules of adjudication must be pursued, when certain degrees of credibility must he accepted, in order to reach the crimes with which the public are infested; Courts of justice should not be deterred from the application of these rules by *every* suspicion of danger, or by the mere possibility of confounding the innocent with the guilty. They ought rather to reflect, that he who falls by a mistaken sentence, may be considered as falling for his country; whilst he suffers under the operation of those rules, by the general effect and tendency of which the welfare of the community is maintained and upheld." It will not, however, be difficult to expose the fallacy of this pernicious and inhuman argument. It is perfectly true that the security of civil life is the first object of all penal laws, and that that security is chiefly protected by the dread of punishment; but then it is of punishment *as a consequence of guilt*, and not of punishment falling indiscriminately on those who have or have not provoked it by their crimes. When the guilty escape the law has merely failed of its intended effect; but when the innocent become its victims, it injures the very persons it was meant to protect, and destroys the security it was meant to preserve. Nor is this all, or even the worst; for it is a great mistake to suppose that the actual wrong and violence done to the innocent man are the *only* evils resulting from

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the disclosure of matters of paramount importance which public policy and social order require to be con-

an erroneous conviction. Confidence in the administration of justice must necessarily be shaken when people reflect, and can truly reflect, that every individual they see condemned to punishment may be in the highest degree unfortunate, and in no degree guilty, his sufferings being inflicted merely as a sacrifice to a supposed expediency. Under such a system, few would care to prosecute for offences, still fewer to come forward with voluntary testimony against persons accused or suspected of them. The law might, indeed, sit in terrific majesty, denouncing the severest penalties, and acting on the most sanguinary and strained maxims, but for want of proofs and co-operation on the part of society, those penalties would soon become a dead letter. It requires strong imaginative powers to see an analogy between the fate of a soldier dying in the defence of his country and that of an innocent citizen butchered in cold blood under the name of justice. The one falls with honour, his memory is respected, his family, perhaps, provided for; while the latter has not even the sad consolation of being pitied, but sees himself branded with public ignominy, leaves a name which will excite nothing but horror or detestation; until, perhaps, in course of time, his innocence becomes manifest, only to awake in all the right-minded portion of the community a feeling of alarm and disgust at the state of insecurity under which they live. "Could the escape of ten of the most desperate criminals," emphatically asks Sir Samuel Romilly, in his "Observations on the Criminal Law of England, &c. Note (D.)," from which some of the preceding remarks have been taken, "have ever produced as much mischief to society as did the public executions of Calas, of D'Anglade, or of Le Brun?"—three celebrated cases which occurred in France, and show the fearful state into which the administration of justice had fallen under the *ancien régime* in that country. But another evil, which seems to have altogether escaped the notice of Dr. Paley, remains to be mentioned. "Instances," observes Sir Samuel Romilly, "have indeed occurred like that of Calas, where a man has been offered up as a sacrifice to the laws, though the laws had never been violated: where the tribunals have committed the double mistake of supposing a crime where none had been committed, and of finding a criminal where none could exist. These, however, are very gross, and therefore very rare examples of judicial error. In most cases the crime is ascertained, and to discover the author is all that remains for investigation; and, in every such case, if there follow an erroneous conviction, a twofold evil must be incurred, *the escape of the guilty, as well as the suffering of the innocent.* Perhaps amidst the crowd of those who

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cealed; such as secrets of state, communications made in professional confidence, and others (*r*).

4. Difference between the securities for legal and historical truth.

§ 50. Another great difference between legal and historical evidence lies in the securities for truth, and the sources of danger and deception peculiar to each. Posterity and future ages are not unfrequently spoken of as a tribunal, to whose judgment appeals may be made from the decisions of the present; and viewed as a figure of speech there is no impropriety in this. But figures must not be mistaken for facts. The tribunal of posterity differs immensely from all others: for it is one of unlimited jurisdiction, both judicial and inquisitorial; it is ever sitting, ever investigating, ever judging; barred by no prescription, bound by no estoppel, and responsible to no human authority. The securities for the truth of the records and traditions of the past which time has brought down to us consist in the multitude of sources to which they can be traced, the large number of persons whose interest it has been to preserve them from oblivion and corruption: above all, the *permanent effects* of events; visible in the shape of monuments and other pieces of real evidence (*s*),

are gazing upon the supposed criminal, when he is led out to execution, may be lurking the real murderer, who, while he contemplates the fate of the wretch before him, reflects with scorn upon the imbecility of the law, and becomes more hardened, and derives more confidence in the dangerous career on which he has entered." See further on this subject, *infrà*, bk. 1, pt. 1.

(*r*) See *infrà*, bk. 3, pt. 2, ch. 8.

(*s*) The following passage is taken from a review in the Examiner newspaper of Laing's "Descriptive Catalogue of Impressions from antient Scottish Seals," December 28th, 1850. "Seals and coins may be considered as bottles filled with memoranda and cast upon the ocean of time by the earlier mariners, for the use of those who came after them. Their forts, their factories, their lighthouses, have many of them disappeared; but the bottles are perpetually being found after many days. * * * Many an obscure allusion in ancient authors has been illuminated by the pure ray serene emitted by a graven gem. The scholar will often find sermons in these stones, excelling the

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customs, ceremonies, and the like: and, finally, the actors in the scene having passed away, there is rarely either opportunity or interest to fabricate evidence in furtherance of their views or justification of their conduct. Now in the case of a legal investigation before a judicial tribunal, properly so called, all this is reversed. The judge or jury, as the case may be, must decide once for all on such evidence as may come before them; the facts—the res gestæ of the dispute—are known but to few, and are matter of interest to fewer; while the parties who are best acquainted with the truth stand in a hostile position to each other, and have a stake at issue which places them under the strongest temptation to misrepresent it. Hence it is obvious that without peculiar guarantees for the veracity and completeness of the evidence adduced in courts of justice, they would, when investigating disputed facts, be exposed to the same risks of error as the historian without the safeguards which he possesses—in a word, the legislator dealing with judicial evidence is bound to frame characteristic securities to meet characteristic dangers.

§ 51. This distinction between historical and legal proof may be illustrated by the consideration of derivative, or second-hand, evidence. The infirmity of this kind of proof has been already pointed out (*t*), and indeed is one of those self-evident things to which the mind of man at once assents. It is equally clear, that the farther evidence is removed from its primary source the weaker it becomes; thus hearsay evidence becomes more suspicious and dangerous according as it is reported at second, third, fourth or fifth hand. And yet, in inquiring into the events of past ages it is scarcely possible to move a step without resorting to

lucubrations of the commentators no less in clearness than in terseness; and he may sometimes be put right by a scarabæus, when a scholiast has failed him."

(*t*) *Suprà*, Part I, § 30.

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this kind of evidence. Suppose the events, sacred and profane, which took place in the first year of the Christian era existed solely in oral tradition, and taking a generation to last thirty years, the account which persons at the commencement of the present century had of those events seems to have come to them by hearsay at the *sixtieth* hand; evidence, the value of which in a court of justice would be rightly estimated at zero, if not below it. And although accounts of many of those events having been committed to writing affords a better security for their truth, still the genuineness of the documents in which they are recorded rests, in part at least, on oral tradition. But it is a great mistake to suppose that the real probative force of the evidence of those facts which we possess in the present century rises no higher than this reasoning would indicate. The fallacy consists in treating each generation as *one* single person by whom a bare relation of the fact has been handed down to the next, and not as consisting of a number of persons interested in ascertaining its truth, besides wholly overlooking the corroborative proofs supplied by permanent memorials and the acts of men. In short, as a modern historian has well expressed it (*u*), "The presumption of history, to whose mirror the scattered rays of moral evidence converge, may be irresistible, when the legal inference from insulated actions is not only technically, but substantially, inconclusive."

§ 52. The offering to prove a historical fact by derivative evidence affords, therefore, not the slightest presumption of unfairness; unless when the evidence is on its face a substitute for some other which might have been procured (*x*). But derivative evidence offered in

(*u*) Hallam's Constitutional History of England, vol. 2, p. 106, 7th Ed.

(*x*) Gibbon, who was not a lawyer, thus expresses himself in the Preface to the fourth volume

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a court of justice, in proof of *recent* events, by a litigant party whose avowed object is to obtain a decision in his own favour, carries so strong an appearance of fraud that the laws of most nations either reject or look upon it with suspicion (*y*). The English law in general rejects it; but reverses the rule in many cases where the matter to be proved has taken place so long ago that the original evidence is manifestly unattainable, and thus far partakes of the nature of a historical fact (*z*).

Mistakes from confounding legal with philosophical and historical evidence.

§ 53. The greatest misconceptions and errors have arisen from confounding legal with philosophical and historical evidence. There is a well-known anecdote of Sir Walter Raleigh, which will serve to illustrate this. While a prisoner in the Tower, composing his History of the World, a disturbance arose under his window, and unable to ascertain its merits through the conflicting accounts which reached him, he is said to have uttered an exclamation against the folly of relying on narrations of the events of past ages, when there is so much difficulty in arriving at the truth of those happening im-

of his History of the Decline and Fall of the Roman Empire. "I have always endeavoured to draw from the fountain head; my curiosity, as well as a sense of duty, has always urged me to study the originals; and if they have sometimes eluded my search, I have carefully marked the *secondary* evidence, on whose faith a passage or a fact were reduced to depend."

(*y*) *Infrà*, bk. 1, pt. 2; and bk. 3, pt. 2, ch. 4.

(*z*) *Infrà*, bk. 3, pt. 2, ch. 4. "Witnesses are either ancient or modern, that is contemporary. * * * Ancient witnesses consist of the poets and other celebrated writers, whose authority for certain facts or opinions are embodied in their immortal works. Thus the Athenians produced the testimony of Homer for their right of dominion over the isle of Salamis, in opposition to the pretensions of the commonwealth of Megara; and in a recent transaction the citizens of Tenedos pleaded the authority of Periander, the wise Corinthian, in a dispute with the inhabitants of Sigeum concerning their common boundaries, &c. * * * *These bear evidence of the past*, &c."—Aristotle's Rhetoric, bk. 1, ch. 15, as freely translated by Gillies.

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mediately around us (*a*). But in that investigation he was discharging a quasi judicial function, without the compulsory powers possessed by courts of justice for extracting truth, and labouring under the further disadvantage of imprisonment; while in dealing with the events of past ages he had the benefit of the securities for historical truth already described (*b*). Much also of Professor Greenleaf's "Examination of the Testimony of the Four Evangelists by the Rules of Evidence administered in Courts of Justice" is founded on the same mistake. Nowhere, however, are the consequences of confounding the two kinds of evidence so visible as in Bentham's work on Judicial Evidence. He entertains the most erroneous notions as to the nature and use of the rules which regulate the burden of proof (*c*); and seems to consider every issue raised in a court of justice as a philosophical question, the actual truth of which is to be ascertained by the tribunal at any cost; or should this be impracticable, then that a decision is to be given founded on the best guess that can be made at it. Thus, speaking of the laws which require a plurality of witnesses in certain cases, he says (*d*), "Every man is excluded, every man, be he who he may, unless he comes with another in his hand. Two propositions are here assumed: all men are liars, and all judges fools. Without the second, the first would be insufficient." The illogical character of this reasoning is obvious at a glance. What the law says in such cases is this—the witness *may* be a liar, and the judge *may* be a fool; and the mischief which might be caused by the folly of the one set in motion by the mendacity of the other would so greatly exceed any advantage that could result from a decision based on their united veracity and wisdom, that for the benefit of the community we arrest the

(*a*) Barrow's History of Ireland, vol. 1, pp. 25, 26.

(*b*) *Suprà*, §§ 50, 51.

(*c*) See 1 Benth. Jud. Ev. 36.

(*d*) 4 Benth. Jud. Ev. 503. See also 5 *Id.* 463, 464.

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inquiry. Perhaps, however, the most glaring instance of this error is where he contends with so much earnestness and vehemence that confidential communications between clients and their legal advisers ought not to be held sacred by law;—an argument founded on the assumption that the compelling their disclosure would advance the ends of justice, by depriving evil-disposed persons of professional assistance in carrying out unrighteous plans (*e*)—we say "unrighteous," for to projected violations of the *law* no professional adviser is expected, or ought for one moment, to render himself party. If, indeed, the existing rule were *suddenly* altered, and everything *hitherto* communicated in professional confidence, under the assurance that it would be kept inviolate, laid open to the view of the courts, much valuable evidence would doubtlessly be obtained; but the first harvest of this kind would be the last, for in future no such communications would be made, either by honest or dishonest clients. It is difficult to paint in too strong colours the evils of such a state of things. For want of materials on which to form a judgment, legal advice would become of little worth; and for want of materials to prepare it, cross-examination, the most powerful instrument for the extraction of truth, would be converted into a lifeless form. Besides, it is a great mistake to suppose that a man's case must necessarily be bad as a whole because there is some weak point in it. Nor is this all. A professional adviser often cannot discharge his functions with effect unless informed respecting matters connected with, though not constituting, the subject of inquiry; the public disclosure of which might be so injurious, that the client would sooner abandon his action or defence than even run the risk of such a calamity by having his counsel or attorney subpœnaed as a witness against him.

(*e*) Benth. Jud. Ev. bk. 9, pt. 4, ch. 5, sect. 2.

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Principal securities for the truth of legal evidence.

§ 54. The securities which have been devised by municipal law for ensuring the veracity and completeness of the evidence given in courts of justice vary, as might be expected, in different countries, and with the systems of law to which they are attached. Several of those principally relied on by the English law; such as the publicity of judicial proceedings, the compulsory presence of witnesses in open court, the right of cross-examination, &c., will be considered in their place (*f*): for the present, we will merely point attention to a few which, either from their value or general adoption, deserve particular notice.

1. Political or legal sanction of truth.

§ 55. To the three sanctions of truth which have been described in the preceding part of this Introduction (*g*), the municipal laws of most nations have added a fourth; which may be called the *legal*, or *political* sanction (*h*), and consists in rendering false testimony an offence cognizable by penal justice. The punishment of this offence has varied in different ages and places: in England, it is a misdemeanor; punishable by fine, imprisonment or penal servitude (*i*).

2. Oaths.

§ 56. The next security is a very remarkable one; and consists in requiring all evidence in courts of justice to be given *on oath*—according to the maxim "In judicio non creditur nisi juratis" (*k*). Oaths however, it is well known, are not peculiar to courts of justice, nor are they even the creatures of municipal law—having been in use before societies were formed or cities built; and the most solemn acts of political and social life being guarded by their sanction.—"Non est arctius vinculum inter homines quàm jusjurandum" (*l*). And

(*f*) *Infrà*, bk. 1, pt. 1.
(*g*) *Suprà*, pt. 1, §§ 16 *et seq.*
(*h*) 1 Benth. Jud. Ev. 198, 221.
(*i*) *Infrà*, bk. 3, pt. 2, ch. 10.
(*k*) Cro. Car. 64. See also 3 Inst. 79.
(*l*) Jenk. Cent. 3, Cas. 54.

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however abused or perverted by ignorance and superstition, an oath has in every age been found to supply the strongest hold on the consciences of men, either as a pledge of future conduct or as a guarantee for the veracity of narration.

§ 57. An oath is an application of the religious sanction—"Jurare est Deum in testem vocare, et est actus divini cultûs" (*m*). It is calling the Deity to witness in aid of a declaration by man (*n*); and consequently does not depend for its validity on the *peculiar* religious opinions of the person by whom it is taken. The Roman Emperor, we are told, "jurejurando quod propriâ superstitione juratum est, standum rescripsit" (*o*): and Lord Chief Justice Willes, in his celebrated judgment in *Omichund* v. *Barker* (*p*), expresses himself as follows:—"Oaths were instituted long before Christianity, were made use of to the same purposes as now, were always held in the highest veneration, and are almost as old as the creation. 'Juramentum nihil aliud est quam Deum in testem vocare;' and therefore nothing but the belief of a God, and that he will reward and punish us according to our deserts, is necessary to qualify a man to take an oath. We read of them, therefore, in the most early times. If we look into the Sacred history, we have an

(*m*) 3 Inst. 165. In the laws of some countries witnesses were required to give their evidence *fasting*. Devot. Inst. Canon. lib. 3, tit. 9, § 12, not. (1).

(*n*) "Le serment est l'attestation de la Divinité à l'appui d'une déclaration de l'homme. Ce témoignage de la croyance des peuples à une justice suprême se retrouve dans tous les pays et dans tons les temps. Pythagore prétendait même que le monde devait son origine à un serment que Dieu lui-même aurait prêté de toute éternité, et dont la création serait l'accomplissement. On sent bien que cette explication, comme la plupart de celles que donne la philosophie sur le mystérieux problème de l'origine du monde, est plus obscure que le fait même à expliquer."—*Bonnier, Traité des Preuves*, § 340, 2nd Ed.

(*o*) Dig. lib. 12, tit. 2, l. 5, § 1.

(*p*) Willes, 545 *et seq.* The case is also reported, 1 Atk. 49, nom. *Omychund* v. *Barker*.

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account in Genesis, ch. 26, v. 28 & 31, and again Gen. ch. 31, v. 53, that the contracts between Isaac and Abimelech, and between Jacob and Laban, were confirmed by mutual oaths; and yet the contracting parties were of very different religions, and swore in a different form." (The Lord Chief Justice, after citing several passages and examples, both from the Old and New Testament, as well as the ancient heathen poets and authors, together with some modern authorities, and, among others, Grotius, De Jure Belli ac Pacis, lib. 2, c. 13, sect. 1 (*q*), in support of this position, proceeds thus): " The forms indeed of an oath have been always different in all countries, according to the different laws, religion, and constitution of those countries. But still the substance is the same, which is, that God in all of them is called upon as a witness to the truth of what we say. Grotius, in the same chapter, sect. 10, says, forma jurisjurandi verbis differt, re convenit. There are several very different forms of oaths mentioned in Selden, vol. ii. p. 1470 (*r*); but whatever the forms are, he says, that is meant only to call God to witness to the truth of what is sworn. 'Sit Deus testis,' 'Sit Deus vindex,' or 'Ita te Deus adjuvet,' are expressions promiscuously made use of in Christian countries; and in ours that oath hath been frequently varied; as 'Ita te Deus adjuvet, tactis sacrosanctis Dei evangeliis;'—'Ita &c., et sacrosancta Dei evangelia;'—'Ita &c., et omnes sancti.' And now we keep only these words in the oath, 'So help you God;' and which indeed are the only material words, and which any heathen who believes a God may take as well as a Christian. The kissing the book here, and the touching the Bramin's hand and foot at Calcutta, and many other different forms which are made use of in different countries, are no part of the oath, but are only ceremonies invented to add the greater solemnity

(*q*) See also Pufendorf, Jus Nat. et Gent. lib. 4, c. 2, § 2.

(*r*) Selden's Works by Wilkins, in six volumes, A.D. 1726.

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to the taking of it, and to express the assent of the party to the oath when he does not repeat the oath itself; but the swearing in all of them, be the external form what it will, is calling God Almighty to be a witness."

§ 58. There is this important distinction among oaths; that many, besides invoking the attestation of a Superior Power, place in the mouth of the swearer a formula by which he imprecates divine vengeance on himself if his testimony be untrue. One of the forms in use among the ancient Romans is thus described: "Lapidem silicem tenebant juraturi per Jovem, hæc verba dicentes, 'Si sciens fallo, tum me Diespiter salvâ urbe arceque bonis ejiciat, ut ego hunc lapidem'" (*s*); and formerly an imprecation formed part of the judicial oath in France (*t*). Some eminent authorities in our own law have used language calculated to convey the notion that oaths are necessarily imprecatory. Thus in Queen Caroline's case (*u*), Lord Chief Justice Abbott, when delivering the answer of the judges to a question put by the House of Lords, says, "Speaking for myself, not meaning, thereby, to pledge the other judges, though I believe their sentiments concur with my own, I conceive, that, if a witness says he considers the oath as binding upon his conscience, he does, in effect, affirm, that in taking that oath, he has called his God to witness that what he shall say will be the truth, and that he has imprecated the divine vengeance upon his head, if what he shall afterwards say is false." In *Rex* v. *White* (*x*), also, the court said, "An oath is a religious asseveration, by which a person renounces the mercy,

(*s*) Festus, de Verbor. Signif. lib. 10, voc. "Lapidem;" and the custom is alluded to by Cicero, Epist. ad Divers. lib. 7, epist. 1; and by Aulus Gellius, Noct. Attic. lib. 1, c. 21. See also 1 Greenl. Ev. § 328, note, 7th Ed.

(*t*) Bonnier, Traité des Preuves, § 352, 2nd Ed.

(*u*) 2 Brod. & B. 285.

(*x*) 1 Leach, C. L. 430.

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and imprecates the vengeance of heaven, if he do not speak the truth." Imprecation is however no part of the essence of an oath; but is a mere adjunct, of questionable propriety, as calculated to divert attention from the true meaning of the ceremony and fix it on some external observance. "An oath," says Pufendorf(*y*), "is a religious asseveration, by which we renounce the divine mercy, or invoke the divine vengeance upon us, unless we speak the truth. That this is the meaning of oaths is apparent from the forms in which they are usually couched, as, for instance, 'So help me God,' 'God be my witness,' 'God be my avenger,' or equivalent expressions which amount to nearly the same thing. For when we call to witness a superior who has a right to inflict punishment on us, we by the act desire of him to avenge perfidy; and the Being who knows all things is the avenger of crime by the being witness to it. Now the loss of the favour of God is in itself an extremely severe punishment." A modern canonist defines an oath "Affirmatio religiosa, hoc est, advocatio Divini Numinis in testem ejus rei, quæ promittitur aut asseritur" (*z*); and the Roman law truly laid down "Jurisjurandi contempta religio satis Deum ultorem habet"(*a*).

§ 59. The utility of oaths in any shape has been strongly questioned (*b*). The good man, it is some-

(*y*) De Jur. Nat. et Gent. lib. 4, c. 2, § 2. "Est autem jusjurandum assertio religiosa, quâ divinæ misericordiæ renunciamus, aut divinam pœnam in nos deposcimus, nisi verum dicamus. Hunc enim juramentorum sensum esse, facile indicant formulæ, quibus illa concipi solent; puta, *Ita me Deus adjuvet, Deus sit testis, Deus sit vindex*, aut his æquipollentes; quæ eodem ferè recidunt. Quando enim superior puniendi jus habens testis advocatur, simul ab eodem perfidiæ ultio petitur; et qui novit omnia ultor est, quia testis. In hoc ipso autem gravissima pœna est, si quem Deus propitius mortalem non adjuvet."

(*z*) Devot. Inst. Canon. lib. 3, tit. 9, § 23.

(*a*) Cod. lib. 4, tit. 1, l. 2.

(*b*) Benth. Jud. Ev. bk. 2, ch. 6.

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times said, will speak the truth without an oath, while the bad man mocks at its obligation. To this, however, the following answer has been given (*c*):—"It must be owned great numbers will certainly speak truth, without an oath; and too many will not speak it with one. But the generality of mankind are of a middle sort; neither so virtuous as to be safely trusted, in cases of importance, on their bare word; nor yet so abandoned, as to violate a more solemn engagement. Accordingly we find by experience, that many will boldly say, what they will by no means adventure to swear: and the difference, which they make between these two things, is often indeed much greater, than they should; but still it shows the need of insisting on the strongest security. When once men are under that awful tie, and, as the Scripture phrase is, have bound their souls with a bond (Numb. xxx. 2), it composes their passions, counterbalances their prejudices and interests, makes them mindful of what they promise, and careful what they assert; puts them upon exactness in every circumstance: and circumstances are often very material things. Even the good might be too negligent, and the bad would frequently have no concern at all, about their words, if it were not for the solemnity of this religious act." The chief arguments brought against oaths, however, are founded on their abuses. One of the greatest of these is *the investing oaths with a conclusive effect*—where the law announces to a person whose life, liberty, or property is in jeopardy, that in order to save it he has only to swear to a certain indicated fact. This was precisely the case of the wager of law anciently used in England (*d*), and the system of purgation under the canon law (*e*). So, in the civil law, either of the litigant parties might in many cases tender

(*c*) Archbishop Secker, as cited in Ram on Facts, 211, 212.

(*d*) 3 Blackst. Comm. 341.

(*e*) Devot. Inst. Canon. lib. 3, tit. 9, § 26, not. 3; 4 Blackst. Comm. 368.

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an oath, called the "decisory oath," to the other; who was bound under peril of losing his cause, either to take it, in which case he obtained judgment without further trouble, or refer it back to his adversary, who then refused it at the like peril or took it with the like prospect of advantage. The judge also (be it remembered there was no jury) had a discretionary power of deciding doubtful cases by means of another oath, called the "suppletory oath," administered by him to either of the parties (*f*). With reference to these, one of the greatest foreign authorities, who to the learning of a jurist added the practical experience of a judge, expressed himself as follows (*g*): "I would advise the judges to be rather sparing in the use of these precautions, which occasion many perjuries. A man of integrity does not require the obligation of an oath to prevent his demanding what is not due to him, or disputing the payment of what he owes; and a dishonest man is not afraid of incurring the guilt of perjury. In the exercise of my profession for more than forty years, I have often seen the oath deferred; and I have not more than twice known a party restrained by the sanctity of the oath from persisting in what he had before asserted." Another great abuse of oaths is their

(*f*) See on the subject of these oaths, Dig. lib. 12, tit. 2; Cod. lib. 1, tit. 1; Domat, Lois Civiles, part. 1, liv. 3, tit. 6, sect. 6; 1 Ev. Poth. Oblig. part. 4, ch. 3, sect. 4; Bonnier, Traité des Preuves, §§ 338—378, 2nd Ed.; Calvin, Lexic. Jurid. voc. "Juramentum," et "Jurisjur. Usus;" Devot. Inst. Canon. lib. 3, tit. 9, §§ 23 *et seq.*

(*g*) 1 Ev. Poth. § 831. With the exception of those cases in which a defendant was allowed to wager his law, abolished by 3 & 4 Will. 4, c. 42, the common law of England, as is well known, always rejected the decisory and suppletory oaths of the civilians. In France the *decisory* oath is not allowed in criminal cases; Bonnier, Traité des Preuves, § 342, 2nd Ed., who says, § 360, that its use in such cases may be considered as having completely disappeared among modern nations. Both in France and by the modern canon law, the *suppletory* oath is confined to civil cases: *Id.* § 378, and Devot. Inst. Canon. lib. 3, tit. 9, § 26.

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frequency. Formerly a system of wholesale swearing pervaded every part of the administration of this country —it was observed, "a pound of tea cannot travel regularly from the ship to the consumer without costing half a dozen oaths at the least" (*h*); and nothing was more common than for persons to go before magistrates and take voluntary oaths on the most trivial occasions. The latter are now prohibited altogether (*i*), and by several modern statutes a declaration has been substituted for an oath in many proceedings of an extrajudicial nature.

3. Establishment of prescribed forms for pre-appointed evidence.

§ 60. Another security for the truth of evidence, and check on the action of fraud and perjury, consists in the establishment by law of prescribed forms to be observed when *pre-appointed* evidence is employed. Of these the principal and most universal is that derived from the use of *writing*. The superiority in permanence, and in many respects in trustworthiness, of written over verbal proofs must have been noticed from the earliest times—"vox audita perit; litera scripta manet." The false relations of what never took place; and even in the case of real transactions the decayed memories, the imperfect recollections and wilful misrepresentations of witnesses; added to the certainty of the extinction, sooner or later, of the primary source of evidence by their death; all show the wisdom of providing some better, or at least more lasting, mode of proof for matters which are susceptible of it, and are in themselves of sufficient consequence to overbalance the trouble and expense of its attainment. "La force des preuves par écrit," says Domat (*j*), "consiste en ce que les hommes sont convenus de conserver par l'écriture le souvenir des choses qui se sont passées, et dont ils ont

(*h*) Paley's Moral and Political Philosophy, bk. 3, pt. 1, ch. 16.

(*i*) 5 & 6 Will. 4, c. 62, s. 13.

(*j*) Domat, Lois Civiles, part. 1, liv. 3, tit. 6, sect. 2. See *infrà*, bk. 2, pt. 3, ch. 1.

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voulu faire subsister la mémoire, soit pour s'en faire des règles, ou pour y avoir une preuve perpétuelle de la vérité de ce qu'on écrit. Ainsi, on écrit les Conventions pour conserver la mémoire de ce qu'on s'est prescrit en contractant, et pour se faire une loi fixe et immuable de ce qui a été convenu. Ainsi, on écrit les Testamens, pour faire subsister le souvenir de ce qu'a ordonné celui qui avait le droit de disposer de ses biens, et en faire une règle à son héritier et à ses légataires. Ainsi, on écrit les Sentences, les Arrêts, les Edits, les Ordonnances, et tout ce qui doit tenir lieu de titre ou de loi. Ainsi, on écrit dans les Registres publics les Mariages, les Baptêmes, les actes qui doivent être insinués; et on fait d'autres semblables registres pour avoir un dépôt public et perpétuel de la vérité des actes qu'on y enregistre. * * * L'écrit conserve invariablement ce qu'on y confie, et il exprime l'intention des personnes par leur propre témoignage." In accordance with these principles, the policy of the common law of England requires that the proceedings of parliament and the higher courts of justice, and some other public matters of great weight and importance, shall be preserved in written records; and that many acts, even among private individuals, must only be done by deed or writing. Large additions have been made in modern times; especially by the institution of public registers for marriages, births, and deaths, &c.; and by the celebrated statute 29 Car. 2, c. 3, commonly called "The Statute of Frauds and Perjuries." Its principal provisions are the prohibiting all parol leases for more than three years, &c. (*k*): and that "no action shall be brought whereby to charge any executor or administrator upon any special promise to answer damages out of his own estate; or whereby to charge the defendant upon any special promise to answer for the debt, default or miscarriages of another person; or

(*k*) Sects. 1 and 2.

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to charge any person upon any agreement made upon consideration of marriage; or upon any contract or sale of lands, tenements or hereditaments, or any interest in or concerning them; or upon any agreement that is not to be performed within the space of one year from the making thereof; unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized" (*l*). The construction put on this section (*m*) has been altered by the 19 & 20 Vict. c. 97, s. 3. The 29 Car. 2, c. 3, likewise enacts (*n*), that "no contract for the sale of any goods, wares or merchandizes, for the price of 10*l.* sterling, or upwards, shall be allowed to be good except the buyer shall accept part of the goods so sold and actually receive the same, or give something in earnest to bind the bargain, or in part of payment, or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized." In many cases also certain forms are superadded to writing. Thus, it is of the essence of a *deed* that it be sealed and delivered (*o*): and by the 7 Will. 4 & 1 Vict. c. 26, s. 9 (explained by 15 & 16 Vict. c. 24), a will must be in writing, and executed by being signed at the foot or end thereof by the testator, or by some other person in his presence and by his direction; and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time; and such witnesses shall attest and subscribe the will in the presence of the testator, &c. It must not be supposed that this is peculiar to our law.

(*l*) Sect. 4.

(*m*) See the cases collected, 1 Smith, Lead. Cas. 275, 6th Ed.

(*n*) Sect. 16 (marked 17 in the ordinary copies).

(*o*) 2 Blackst. Comm. 305, 306; Finch, Com. Laws, 24 a.

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The Jews, the Romans, and the Anglo-Saxons had, and most modern nations have, their pre-appointed evidence;—requiring certain acts to be done by writing, or in some particular way. See a variety of instances collected in Greenleaf's Law of Evidence, vol. 1, § 262, note (1), 7th edit.; and for the French law, see Bonnier, Traité des Preuves, part. 2, liv. 2, 2nd Ed.

§ 61. As a general rule, when the law prescribes forms for pre-appointed evidence the non-compliance with them is fatal to the transaction, and the whole becomes a nullity. "Non observatâ formâ infertur adnullatio actûs" (*p*). "Forma legalis, forma essentialis" (*q*). "Solemnitates legis sunt observandæ" (*r*). Bentham recommends that this should be reversed, and that pointed suspicion, not nullification, should be the result (*s*); but he admits that nullification is just in certain cases (*t*). It is impossible to deny that the principle under consideration may be, and often has been, extended beyond the limits alike of usefulness and propriety; and the truth and good sense of the entire matter seem contained in the following observations of Sir W. D. Evans (*u*). "The interest of society is greatly promoted, by establishing authentic criteria of judicial certainty, so far as this object can be effectuated without materially interfering with the claims of general convenience. Where the acts which may become the subject of examination will admit of deliberate preparation, and the purposes of them evince the propriety of a formal memorial of their occurrence, more especially when they are from their nature subject to error and misrepresentation, it is reasonable to expect that those

(*p*) 5 Co. iv. a; 12 Co. 7. The same holds in the French law. See Bonnier, Traité des Preuves, § 418, 2nd Ed.; Domat, part. 1, liv. 3, tit. 6, s. 2, § vi.

(*q*) 10 Co. 100 a.

(*r*) Jenk. Cent. 1, Cas. 22, and Cent. 3, Cas. 45.

(*s*) 2 Benth. Jud. Ev. 467, 487, 518.

(*t*) *Id.* 470.

(*u*) 2 Ev. Poth. 142.

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who are interested in their preservation should provide for it in a manner previously regulated and established, or that, in case of neglect, their particular interest should be deemed subordinate to the great purposes of general certainty. But it is also certain that this system of precaution may be carried too far, by the exaction of formalities, cumbersome and inconvenient to the general intercourse of civil transactions; the special application of these principles must be chiefly governed by municipal regulations: but as a general observation, it is evident that the great excellence of any particular system must consist in requiring as much certainty and regularity as is consistent with general convenience, and in admitting as much latitude to private convenience as is consistent with general certainty and regularity. It may be added, that for these purposes every regulation should be attended with the most indisputable perspicuity; and that the established forms should be cautiously preserved from any intricacy or strictness, that may tend to perplex and embarrass the subjects which they were designed to elucidate, and to endanger and destroy the substance which they were instituted to defend."

4. Rejection of the testimony of suspected persons.

§ 62. Another plan, resorted to by the laws of most nations for guarding against misdecision, consists in the repudiation as witnesses of persons whose testimony, either from personal interest in the matter in dispute or other visible cause, seems likely to prove untrustworthy. This is the *recusatio testis* of the civilians, as distinguished from the recusatio judicis, or challenge of the judge, and in our law is called "The Incompetency of Witnesses." Its policy however has been seriously doubted, even fiercely attacked, in modern times, and much has been said and written on both sides of the question (*x*). Perhaps the true view of this matter is that the

Policy of this.

(*x*) See Benth. Jud. Ev. vol. i. 542, 543, and bk. 9, pt. 3; Tayl. Ev. § 1210 *et seq.*, 5th Ed.; pp. 3, 151, 152; vol. ii. pp. 541,

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principle of repudiation should, at least in general, be confined to *pre-appointed* evidence. There is a great difference between the rejection of *evidence* and the rejection of *witnesses*. Evidence may fairly be rejected when so remote that to allow tribunals to act on it would invest them with dangerous or unconstitutional power; or, when, being derivative instead of original, its very production carries the impress of fraudulent suppression of better; or, when its disclosure might endanger the public safety. But the testimony of *casual* witnesses to a fact, *i. e.* persons who have incidentally witnessed it; and this is often an act unforeseen except by the doer, who may be deeply interested in its concealment; comes under none of these heads. Such witnesses are the original depositories of the evidence; what they have been heard to say out of court would be open to the same objections as their testimony in it, aggravated by the disadvantage of being produced *obstetricante manu;* and in many cases the excluding their testimony would be to exclude all attainable evidence on the question in dispute, and offer by impunity a premium to dishonesty, fraud, and crime. If it be said that owing to personal interest in the matter in question, unsoundness of mind, deficiency of religion, antecedent misconduct, &c., their evidence is likely to prove unsafe; the answer is, that any line drawn on this subject must necessarily be in the highest degree arbitrary. It is impossible to enumerate à priori the causes which may distort or bias the minds of men to mis-state or pervert the truth, or to estimate the weight of each of these causes in each individual case or with each particular person. But it is very different with *pre-appointed* evidence, where parties have the power to select their witnesses, and thus make the original depositories of

Ph. & Am. Ev. 43—45; Bonnier, Traité des Preuves, §§ 225 *et seq.*, 275 *et seq.*, 2nd Ed.

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the evidence to their acts. To such parties the law may fairly say, "You shall for this purpose select persons who from their station, occupation, or habits are likely to be of more than ordinary intelligence, knowledge, or trustworthiness: if you do not, you must take the consequences." All this seems a natural and just development of the great principle,—in the English law a fundamental one,—that requires the *best evidence* to be given, and is further recommended by being rarely productive of injury or inconvenience (*y*).

Enormous abuses of it.

§ 63. But whatever the real value of this plan for securing the trustworthiness of evidence, its abuses have been enormous. In the civil and canon laws the list of persons liable to be rejected as incompetent to bear testimony was so large that, if the rules of exclusion had not been qualified or evaded, it is difficult to see how, even with the interrogation of parties and the perilous aid of the decisory and suppletory oaths, justice could have been administered at all (*z*). And these very qualifications and evasions gave rise to a still greater evil, which shall be noticed presently (*a*). In some instances entire classes were rejected, not from any distrust of their veracity, but as a punishment for offences, or with the view of affixing a stigma on religious or political opinions. The strongest illustration of this is to be found in the celebrated constitution of the Greek emperor: by which Pagans, Manichæans, and members of some other sects, were disqualified

(*y*) See on this subject, bk. 1, pt. 1, and bk. 3, pt. 2.

(*z*) See Dig. lib. 22, tit. 5; Cod. lib. 4, tit. 20; Hnberus, Præl. Jnr. Civ. lib. 22, tit. 5; Heinec. ad Pand. par. 4, §§ 136—140; Devot. Inst. Canon. lib. 3, tit. 9, §§ 13 *et seq.*, 5th Ed.; Decret. Greg. IX. lib. 2, tit. 20. Bonnier, in his Traité des Prenves, §§ 225 *et seq.*, considers that the positive rejection of witnesses was rare in the ancient Roman law, and that the complicated system established in Europe was chiefly the work of the middle ages.

(*a*) See *infrà*, § 74.

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from giving evidence under any circumstances; while heretics and Jews were only allowed to do so in causes in which heretics or Jews were parties, and, except in some peculiar cases from necessity, could not bear testimony against orthodox Christians (*b*). Similar principles prevailed in the canon law (*c*), which also, as might have been expected, rejected the evidence of excommunicated persons, at least when tendered against such as were orthodox (*d*). Even whole races and nations have occasionally been brought within the pale of exclusion; as in some parts of the West Indies (*e*), and some of the United States of America (*f*), where the evidence of a negro slave was not receivable against a free person; and in India, where that of a Hindoo

(*b*) Cod. lib. 1, tit. 5, l. 21. We subjoin this constitution entire. "Quoniam multi judices in dirimendis litigiis nos interpellaverunt, nostro indigentes oraculo, ut eis referetur quid de testibus hæreticis statuendum sit, utrumne accipiantur eorum testimonia, an respuantur, sancimus, contra orthodoxos quidem litigantes nemini hæretico, vel his etiam qui Judaïcam superstitionem colunt, esse in testimonia communionem: sive utraque pars orthodoxa sit, sive altera. Inter se autem hæreticis, vel Judæis, ubi litigandum existimaverint, concedimus fœdus permixtum, et dignos litigatoribus etiam testes introducere: exceptis scilicet his, quos vel Manichaicus furor (cujus partem et Borboritas esse manifestum est), vel Pagana superstitio detinet: Samaritis nihilominus, et qui illis non absimiles sunt, Montanistis, et Tascodrogitis, et Ophitis; quibus pro creatus similitudine omnis legitimus actus interdictus est. Sed his quidem, id est, Manichæis, Borboritis, et Paganis, necnon Samaritis, et Montanistis, et Tascodrogitis, et Ophitis omne testimonium, sicut et alias legitimas conversationes sancimus esse interdictum. Aliis vero hæreticis tantummodo judicialia testimonia contra orthodoxos, secundùm quod constitutum est, volumus esse inhibita. Cæterum testamentaria testimonia eorum, et quæ in ultimis elogiis, vel in contractibus consistunt, propter utilitatem necessarii usus, eis sine ulla distinctione permittimus, ne probationum facultas angustetur."

(*c*) Lancel. Inst. Jur. Can. lib. 3, tit. 14, § 19; Ayl. Par. Jur. Can. Angl. 448; Devot. Inst. Canon. lib. 3, tit. 9, § 13.

(*d*) Lancel. *in loc. cit.*

(*e*) Browne's Civil Law, vol. i. p. 107, note, 2nd Ed.; Shephard's Colonial Practice of St. Vincent, 69, 70.

(*f*) Appleton on Evidence, App. 271, 275, 276, 277, 278.

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seems not to have been receivable against a Mohammedan (*g*). The following law of the State of Alabama, passed so late as 1852, carried the matter much farther: "Negroes, mulattoes, Indians, *and* all persons of mixed blood, descended from negro or Indian ancestors, to the third generation included, though one ancestor of each generation may have been a white *person*, whether bond or free, cannot be a witness in any cause, civil or criminal, except for or against each other" (*h*). Although the English law never went so far in this respect as those of most other countries, yet even among us the number of grounds of incompetency to give evidence was formerly very considerable. They have been much reduced in modern times, by the decisions of the judges and the interference of the legislature (*i*).

§ 64. One of the strangest and most absurd applications of this principle was the rejecting, or at least regarding with suspicion, the testimony of *women* as compared with that of *men*. The following law is attributed to Moses by Josephus: "Let the testimony of women not be received, on account of the levity and audacity of their sex" (*k*);—a law which looks apocryphal (*l*), but which even if genuine could not have been of universal application (*m*). The Hindu code, it appears,

(*g*) See Arbuthnot's Reports of the Foujdaree Udalnt, p. 1, and Preface, p. xxiii; Goodeve, Evid. 113.

(*h*) Appleton, Evid., App. 275, 276.

(*i*) On the subject of the incompetency of witnesses, see bk. 1, pt. 2, and bk. 2, pt. 1, ch. 2.

(*k*) Joseph. Antiq. Jndaic. lib. 4, c. 8, No. 15. Γυναικῶν δὲ μὴ ἔστω μαρτυρια, διὰ κεφότητα καὶ θράσος τοῦ γένες αὐτων.

(*l*) Independent of the inspiration of the Pentatench and its significant silence on the snbject, the style of this law is widely different from that of Moses.

(*m*) There is at least one instance in the Pentateuch where the evidence of a woman was receivable, and this even in a *capital* case: "If a man have a stubborn and rebellious son, which will not obey the voice of his father, or the voice of his mother, and that, when they have chastened him, will not hearken nnto them: then shall his father and his mother lay hold on him, and bring him out unto the

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rejected their evidence generally, if not absolutely (*n*); as likewise did the Mohammedan law on charges of adultery, and in some other instances (*o*). Nor were these merely Asiatic views. The law of ancient Rome, while admitting their testimony in general, refused it in certain cases (*p*). The civil and canon laws of mediæval Europe seem to have carried the exclusion much farther (*q*). Mascardus (*r*) says, "Feminis plerumque omninò non creditur, ob id duntaxat, quod sunt feminæ, quæ ut plurimum solent esse fraudulentæ, fallaces, et dolosæ;" and Lancelottus, in his Institutiones Juris Canonici (*s*), lays down in the most distinct terms that women cannot in general be witnesses, citing the language of Virgil, "Varium et mutabile semper femina" (*t*),—not the only instance in which poetry has been invoked to justify maxims and laws indefensible by reason. That these rules were plastic enough, like the other rules of those systems, so as to admit many exceptions, may easily be conceived (*u*); but the following extract, from the work of an able French jurist of our

elders of his city, and unto the gate of his place; and they shall say unto the elders of his city, This our son is stubborn and rebellious, he will not obey our voice; he is a glutton, and a drunkard. And all the men of his city shall stone him with stones, that he die: so shalt thou put evil away from among you; and all Israel shall hear, and fear:" Deut. xxi. 18—21. Solomon, also, in his celebrated judgment, 1 Kings, iii. 16 *et seq.*, seems to have made no difficulty about receiving the statements of the two women.

(*n*) See Translation of Pootee, ch. 3, s. 8, in Halhed's Code of Gentoo Laws, and Goodeve, Evid. 87.

(*o*) See Gibbon's History of the Decline and Fall of the Roman Empire, ch. 50; Hamilton's Translation of Hedàya, vol. i. p. 382; MacnaghtensMoohummedanLaw, 77; and Arbuthnot's Reports of the Foujdaree Udalut, p. 3.

(*p*) Dig. lib. 22, tit. 5, l. 18.

(*q*) Mascard. de Prob. Concl. 763—765; Lancel. Inst. Jur. Can. lib. 3, tit. 14, §§ 14 and 15; Decret. Gratian. Pars 2, Causa 33, Quæst. 5, c. 17. See also Heinec. ad Pand. Pars 4, § 127 (2).

(*r*) Mascardus de Prob. Concl. 763, NN. 2, 3.

(*s*) Lib. 3, tit. 14, §§ 14 and 15.

(*t*) Æn. 4, 569, 570.

(*u*) See Mascard. *in loc. cit.*

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time, shows how long the principle held its ground on the continent (*x*). "After women had been admitted to bear testimony by an ordinance of Charles VI." (of France) "of the 15th Nov. 1394, it was long before their evidence was considered equivalent to that of a man. Bruneau, although a contemporary of Mde. de Sévigné, did not scruple to write, in 1686, that the deposition of three women was only equal to that of two men. At Berne, so late as 1821; in the Canton of Vaud, so late as 1824, the testimony of two women was required to counterbalance that of one man. We will say nothing of the minor distinctions with which the system was complicated, such, for instance, as the principle that a virgin was entitled to greater credit than a widow—*magis creditur virgini quàm viduæ.*" In the edition of the Institutiones Canonicæ of Devotus (*y*), published at Paris in 1852, it is distinctly stated that, except in a few peculiar instances, women are not competent witnesses in criminal cases. In Scotland also, until the beginning of the 18th century, sex was a cause of exclusion from the witness box in the great majority of instances (*z*). Even our old English lawyers occasionally rejected the evidence of women on the ground that they are *frail* (*a*). Sir Edward Coke (*b*), in the reign of Charles I., without a single note of dissent or disapprobation, writes thus:—"In some cases women are by law wholly excluded to bear testimony; as to prove a man to be a villein (*c*)—*mulieres ad probationem statûs hominis admitti non debent.*" It seems also that in very

(*x*) Bonnier, Traité des Preuves, § 243, 2nd Ed.

(*y*) Lib. 3, tit. 9, § 14.

(*z*) Hume, Crim. Law of Scotland, vol. 2, pp. 339, 340; Burnett, Crim. Law of Scotland, 388—390; 20 Ho. St. Tr. 44, note.

(*a*) Fitzh. Abr. Villenage, pl. 37; Bro. Abr. Testmoignes, pl. 30.

(*b*) Co. Litt. 6 b.

(*c*) Acc. Fitzh. Abr. Villenage, pl. 37; Bro. Abr. Testmoignes, pl. 30, who refers to a case in the 13 Edw. I.; Britton, c. 31. See, however, the case on the eyre of York, in the 13 Hen. III., cited by Fitzh. Villenage, pl. 43.

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early times their testimony was insufficient to prove issue born alive, so as to entitle a man to be tenant by the curtesy (*d*); neither could they prove the summons of jurors in an assize (*e*).

5. Requiring a certain number of media of proof.

§ 65. One of the most obvious modes of guarding against misdecision consists in the exacting a certain number of witnesses or other media of proof.

Advantages of.

The advantage of a plurality of witnesses consists in this, that a false story runs great risk of being detected by discrepancies in their testimony, especially if they are questioned skilfully and out of the hearing of each other (*f*).

Evils of.

But, however salutary such a rule may be in countries where mendacity and perjury are so common and notorious as scarcely to be looked upon as crimes (*g*), and everywhere in some cases of a serious and peculiar nature, it is certainly not based on any principle of general jurisprudence, and wherever so considered has brought immense evils in its train (*h*).

Practice of the civilians and canonists.

§ 66. The law of Moses in certain criminal cases, and the New Testament in certain ecclesiastical matters, re-

(*d*) See Hargrave's Co. Litt. 29 b, note 5.

(*e*) Co. Litt. 158 b.

(*f*) A celebrated application of this principle is to be found in the story of Susannah and the Elders, in the Apocrypha.

(*g*) See the picture drawn by Cicero, in his oration for Flaccus, of the profligacy of the Greeks in this respect. "In some countries," says Bentham, 3 Jud. Ev. 168—9, "there have been said to exist a sort of houses-of-call, or register-offices, for a sort of witnesses of all work, as in London for domestic servants and workmen in different lines, and in some parts of Italy for assassins. Ireland, whether in jest or in earnest, was at one time noted for breeding a class of witnesses, known for trading ones by a symbol of their trade, straws sticking out of their shoes. Under the Turkish Government, it seems generally understood that the trade of testimony exists upon a footing at least as flourishing as that of any other branch of trade." The morals of mediæval Europe are well known to have been very low on this subject; and all accounts agree in describing hardened perjury as still rife throughout the East. As to India see Goodeve, Evid. 238.

(*h*) See *infra*, §§ 69 *et seq.*

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quired two witnesses; whence the civilians and canonists (the latter at least) inferred a divine command to exact that number in all cases, both civil and criminal (*i*). The text of the Imperial Code is positive: "Manifestè sancimus, ut unius omninò testis responsio non audiatur, etiamsi præclaræ curiæ honore præfulgeat (*k*): Solâ testatione prolatam, nec aliis legitimis adminiculis causam approbatam, nullius esse momenti, certum est" (*l*). And that of the Decretals runs thus (*m*): "Licèt quædam sint causæ quæ plures quàm duos exigant testes, nulla est tamen causa, quæ unius testimonio (quamvis legitimo) terminetur." Sometimes even this was insufficient. Five witnesses were required by the imperial law to prove certain payments (*n*): the canon law occasionally required five, seven, or more, witnesses to make full proof (*o*); and the number necessary on criminal charges brought against persons in office in the church is almost incredible (*p*). By the law of Mohammed a woman

(*i*) See *infrà*, bk. 3, pt. 2, ch. 10.

(*k*) Cod. lib. 4, tit. 20, l. 9, § 1.

(*l*) Cod. lib. 4, tit. 20, l. 4. Bonnier, in his Traité des Preuves, § 241, 2nd Ed., has an able argument to show that this principle was not established in the Roman jurisprudence until the time of the Lower Empire, and had its origin in the constitution of the Emperor Constantine, Cod. lib. 4, tit. 20, l. 9, § 1, which (Bonnier thinks) converted into a rule of law what had previously been laid down as matter of advice and caution. See further on this subject, Hubertus, Præl. Jur. Civ. lib. 22, tit. 3, n. 2, and *infrà*, bk. 3, pt. 2, ch. 10.

(*m*) Decretal. Greg. IX. lib. 2, tit. 20, c. 23.

(*n*) Cod. lib. 4, tit. 20, l. 18.

(*o*) Ayl. Par. Jur. Can. Angl. 444; 1 Greenl. Ev. § 260 a, notes, 7th Ed.; *Evans* v. *Evans*, 1 Roberts. Eccl. R. 171.

(*p*) Fortescue, in his Treatise de Laud. Leg. Angl. cap. 32 (written before the Reformation), tells us of a "lex Generalis Concilii, quâ cavetur, ut non nisi *duodecim testium* depositione cardinales de criminibus convincantur." Waterhouse, in his Commentary on Fortescue, p. 405, says he is not aware what council is here alluded to, nor have we been able to find it; but he refers to the 2nd Council of Rome, under Sylvester, as given in the Concilia of Binius, vol. 1, pp. 315 and 318, the third chapter of which contains as follows. "Non damnabitur præsul, nisi in septuaginta duobus, neque præsul summus à quoquam judicabitur, quoniam his scriptum est:

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could not be convicted of adultery unless on the testimony of *four male* witnesses (*q*); and his successor the Caliph Omar decided, with reference to this law, that all circumstantial evidence, however proximate and convincing, was of no avail, and that the four male witnesses must have witnessed the very act in the strictest sense of the word (*r*).

§ 67. But since evidence may be circumstantial as well as direct, the system would have been imperfect were not the number of *circumstances* requisite for conviction defined with the same logical precision. *Three* presumptions at least were therefore considered necessary by certain doctors of the civil law; unless they were extremely strong, in which case *two* might suffice (*s*); and the Austrian legislature, by a law passed so late as 1833, but now abolished, prohibited in general all condemnation from circumstances unless there were at least three. The climax of absurdity however appears in the code which until recently existed in Bavaria. Having observed that inculpative circumstances are of three

Non est discipulus super magistrum. Presbyter autem, nisi in quadraginta quatuor testimonia non damnabitur. Diaconus autem cardine constrictis urbis Romæ, nisi in triginta sex, non condemnabitur. Subdiaconus, acolythus, exorcista, lector, nisi (sicut scriptum est) in septem testimonia filios et uxorem habentes, omnino Christum prædicantes, sicut datur mystica veritas." In the laws of Hen. I. c. 5, also, there is this passage. "Non dampnetur presul nisi in lxxii. testibus; neque presul summus a qnoquam judicetur. Presbiter cardinalis nisi in xliiii. testibus non dampnabitur; diaconus cardinalis nisi in xxvi.; subdiaconus et infra nisi in vii.; nec major in minorum impetitione dispereat." In the Law Review, vol. i. p. 380, and vol. iv. p. 133, it is stated that by the canon law, in the case of a cardinal charged with incontinence, the *plena probatio* must be established by no less than seven eye-witnesses: but no authority is cited. See also 1 Greenl. Ev. § 260 a, note (1), 7th Ed., and Devot. Inst. Canon. lib. 3, tit. 9, § 9, not. 3.

(*q*) Gibbon's History of the Decline and Fall of the Roman Empire, ch. 50. See also Goodeve, Evid. 113.

(*r*) Gibbon, in loc.

(*s*) Bonnier, Traité des Preuves, § 723, 2nd Ed.

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kinds: viz., *antecedent* to the act, as preparations, threats, &c.; *concomitant*, as in case of homicide a weapon of the accused found near the dead body; and, *subsequent*, as flight from justice, attempts to suborn witnesses, and the like; the Bavarian legislature ordained that some circumstances belonging to each class must be proved (*t*).

Abuses of judicial evidence.

§ 68. There is unquestionably no branch of jurisprudence whose principles have been so much abused and pushed beyond their legitimate limits as judicial proof, especially with regard to its *exclusionary* rules. This arises partly from its having been comparatively little understood in former times—the substantive branches of law always coming to perfection before the adjective—and partly from artificial rules of evidence being found an excellent shield for acts which it is not desired to suppress, but which it would be unsafe or scandalous to legalize. In such cases the prohibiting the act, but requiring for the establishment of it evidence so peculiar, either in quantity or quality, as to render condemnation practically impossible, is the ready device of corrupt legislation. Some abuses of judicial evidence have been alluded to in the course of this Introduction; and we purpose to conclude it by pointing attention to *two;* which, owing to their magnitude, their prevalence, and the danger under which all tribunals, especially such as are of a permanent nature, lie from them, deserve particular notice.

Two particularly deserving notice.

1. Artificial legal conviction.

§ 69. The first of these has its origin in a natural tendency of the human mind to re-act or turn round on itself, by assuming the convertibility of the end with the means used to attain it. As connected with the

(*t*) It is right to mention that the statements here made relative to the laws of Austria and Bavaria are taken from Bonnier, Traité des Preuves, §§ 723 & 727, 2nd Ed.

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subject before us, this displays itself in the creation of a system of *technical*, and as it were *mechanical* belief, dependent on the presence of instruments of evidence in some given number; and which has with great truth and power been designated by Bonnier, in his Traité des Preuves (*u*), "système qui *tarifait* les témoignages, au lieu de les soumettre à la conscience du juge." It is strongly illustrated by the practice of the civil and canon laws on the continent of Europe, thus ably described by the eminent French lawyer just quoted (*x*). "The technical rules relative to testimonial proof which were devised, or at least developed, by the doctors of the middle ages, are of two kinds. Some tend to exact absolutely certain conditions in order that legal conviction may exist, while others, still more extravagant, to create in certain cases an *artificial legal conviction* even where real conviction may not exist." "If," he adds in another place (*y*), "the rule rejecting the testimony of a single witness was not perfectly reasonable; another principle, dangerous in a very different way, was that which, creating a legal conviction altogether artificial, established that the concurrent depositions of two unsuspected witnesses must necessarily induce condemnation. Here the application of the texts of the Corpus Juris was completely mistaken; for such a logical error was never professed at Rome, or even at Constantinople." But it was exactly suited to the scholastic and supersubtle spirit of more recent times. The texts of the code and of the decretal being peremptory, that the testimony of one witness could not be acted on under any circumstances (*z*), and that two were sufficient in all cases where no greater number

(*u*) § 199, 2nd Ed.

(*x*) *Id.* § 239.

(*y*) Bonnier, Traité des Preuves, § 242, 2nd Ed. See also 5 Benth. Jud. Ev. 470, 471.

(*z*) Cod. lib. 4, tit. 20, l. 9. "Unius omnino testis responsio non audiatur, etiamsi præclaræ curiæ honore præfulgeat."

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was expressly required by law (*a*); the doctors of the civil and canon laws hastily, (they perhaps thought logically,) inferred that the deposition of two witnesses who were omni exceptione majores, amounted to *proof;* and bestowed on it the name of *full proof*—"plena probatio" (*b*)—forgetting that proof means persuasion wrought in the mind, and consequently must depend, not on the number of instruments of evidence employed, but on their force, credibility, and concurrence. Nor was this all. If the testimony of two witnesses made full proof, that of one must be a *half proof,* which they called "semi-plena probatio" (*c*); and this arithmetical mode of estimating testimony being once established, it was extended by analogy to presumptive evidence, so that the subtilties of "proof" and "semi-proof" ran through the entire judicial system. Thus admissions extracted by torture (*d*), entries made by tradesmen in their books to the prejudice of other persons (*e*), an oath to the truth of his demand or defence administered by the judge to the plaintiff or defendant (*f*), and occasionally even fame or rumour (*g*), were recognised as semi-proofs; two such usually constituting full proof. Some of the later civilians; feeling the absurdity of the position that the probative force of evidence is necessarily represented by unity, zero, or one half; introduced a sub-division of semi-proof into semi-plena

(*a*) Dig. lib. 22, tit. 5, l. 12. "Ubi numerus testium non adjicitur, etiam duo sufficiunt: pluralis enim elocutio duorum numero contenta est." See also Heinec. ad Pand. pars 4, § 143.

(*b*) Heinec. ad Pand. pars 4, §§ 118 and 143; Mascard. de Prob. Qnæst. 11; Ayl. Par. Jur. Can. Angl. 544, 448.

(*c*) Mascard. in loc. cit.; Ayl. Par. Jur. Can. Angl. 444.

(*d*) Mascard. de Prob. Concl. 1392. See also Bonnier, Traité des Preuves, § 241, *vers. fin.*, 2nd Ed.

(*e*) Heinec. ad Pand. pars 4, § 134; 1 Ev. Poth. 719.

(*f*) 1 Ev. Poth. §§ 719, 829, 834; Heinec. ad Pand. pars 3, §§ 28, 29.

(*g*) Mascard. de Prob. Concl. 754, 755; Lancel. Inst. Jur. Can. lib. 3, tit. 14, §§ 1 and 54; Ayl. Par. Jur. Can. Angl. 444.

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major, semi-plena, and semi-plena minor (*h*); which, in all probability, only served to make matters worse, by rendering the system more technical. And a like rule was sometimes applied to the *credit* of witnesses. "The parliament of Toulouse," says Bonnier (*i*), quoting another French author, "has a peculiar mode of dealing with objections; it sometimes receives them according to their different quality, so that they do not destroy the deposition of the witness altogether, but leave it good for an eighth, a quarter, a half, or three-quarters; and a deposition thus reduced in value requires the aid of another to become complete. For example, if on the depositions of four witnesses objected to, two are reduced to a half, that makes one witness; if the third deposition is reduced to a fourth, and the fourth to three-quarters, that makes another witness, and consequently there is a sufficient proof by witnesses, although all have been objected to, and suffered in some degree from the objections taken."

§ 70. So firmly was this vicious principle worked into the law of France that, in the great legal reform which took place in that country at the beginning of the present century, it was deemed advisable to take effective measures for its extirpation. With this view the Code Napoleon (*k*) ordained, that in criminal cases a sort of general instruction should be read to every jury by their foreman before commencing their deliberations,

(*h*) Heinec. ad Pand. pars 4, § 118; Kelemen, Institutiones Juris Hungarici Privati, lib. 3, §§ 98 and 100.

(*i*) Bonnier, Traité des Preuves, § 243, 2nd Ed. This practice of the parliament of Toulouse is likewise alluded to in Burnett's Crim. Law of Scotland, 528. It is worthy of remark that the same vicious principle was at one period creeping into the jurisprudence of the last-mentioned country, which borrowed so much from the civil law. See Hume's Crimin. Law of Scotland, &c., vol. ii. ch. 10, pp. 293 *et seq.*; and 19 How. St. Tr. 75 (note).

(*k*) Code d'Instruction Criminelle, liv. 2, tit. 2, ch. 4, sect. 1, § 342.

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and should also be affixed in large letters in the room where they retire to deliberate; part of which is as follows:—"La loi ne demande pas compte aux jurés des moyens par lesquels ils se sont convaincus; elle ne leur prescrit point de règles desquelles ils doivent faire particulièrement défendre la plénitude et la suffisance d'une preuve; elle leur prescrit de s'interroger eux-mêmes dans le silence et le recueillement, et de chercher, dans la sincérité de leur conscience, quelle impression ont faite sur leur raison les preuves rapportées contre l'accusé, et les moyens de sa défense. La loi ne leur dit point, '*Vous tiendrez pour vrai tout fait attesté par tel ou tel nombre de témoins;*' elle ne leur dit pas non plus, '*Vous ne regarderez pas comme suffisamment établie toute preuve qui ne sera pas formée de tel procés verbal, de telles pièces, de tant de témoins ou de tant d'indices;*' elle ne leur fait que cette seule question, qui renferme toute la mesure de leurs devoirs, '*Avez-vous une intime conviction?*'" This seems running into the other extreme—for it implies, in language at least, that the jury are not confined to the legal evidence adduced, but are to form their judgment on whatever they know of themselves, or have heard elsewhere, or believe, respecting the matter before them. However this may be, the French civil code containing no analogous provision, Bonnier (in 1843 and 1852) thought it necessary to consider whether in civil cases the two witnesses are still required, or the "intime conviction" is dispensed with; both which points he resolves in the negative (*l*).

(*l*) Bonnier, Traité des Preuves, §§ 201, 202, and 2nd Ed. §§ 241, 242. It is but justice to many of the eminent civilians who in later times commented on the Roman law, to state that they were perfectly alive to the absurdity of this theory of proof and semi-proof. See Huberus, Præl. Jur. Civ. lib. 22, tit. 3, n. 2; Heinec. ad Pand. pars 4, § 118. It was however too firmly established to be shaken, so that no resource remained but to evade it; and the working of the system has been thus ably exposed:—"In the Roman law, two witnesses are pronounced indispensable. In the

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Bentham's scale.

§ 71. The substitution of arithmetic for observation and reasoning when estimating the value of evidence is

penal branch (the higher part at least), what followed? Torture. By fewer than two witnesses, a man was not to be consigned to death; but by a single witness he might at all times be consigned to worse than death. If, then, being guilty, he had it in his power to relate and circumstantiate a guilty act, at any time, if he thought fit, he might, at the price of future suffering, release himself from present torments. But if, not being guilty, and in consequence not having it in his power to circumstantiate the guilty act, he had it not in his power to release himself at that price, he was to suffer on: perishing or not perishing, under or in consequence of the infliction, as it might happen. Upon the face of it, and probably enough in the intention of the framers, the object of this institution was the protection of innocence. The protection of guilt, and the aggravation of the pressure upon innocence, was the real fruit of it. In the non-penal branch, the experienced mischievousness of the rule forced men upon another shift, of which, if the mischievousness be not so serious, the absurdity is more glaring. I mean the operation of splitting one man into two witnesses. Proposing to himself to make a customer, or non-customer, pay for what he has had, or not had,—a shopkeeper makes, in his own books, an entry of the delivery of the goods accordingly, and by this entry he makes himself one witness. A suit is then instituted by himself, against the supposed customer, for the value of the goods: he now takes an oath in a prescribed form, swearing to the justness of the supposed debt, and by this oath he coins himself into a second witness, the second witness which the law requires. By the same rule, if three had been the requisite complement of witnesses, two such oaths might have completed it; if four witnesses, three oaths; and so on. With a splitting mill of such power at his command, a man need never be at a loss for witnesses. In every cause, the plaintiff, to gain it, must make full proof (*probatio plena*). The tradesman's books make half a full proof (*probatio semi-plena*): his oath, as above (his *suppletory oath*, it is called), makes the other half. Heinec. iv. 134. Sixteen paragraphs before, in the book of authority, from which, for reference sake, the instance has been taken, the reader has been assured (and that without exception, and in the most pointed terms), that a half full proof, though composed of the testimony, regularly extracted, of a disinterested witness, of the most illustrious and consequently trustworthy class, goes absolutely for nothing." 5 Benth. Jud. Ev. 481—483. That this statement of the practice of the civilians does not rest on the unsupported authority of Heineccius, see the authorities cited in the notes to the present and preceding articles.

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not confined to past ages. Bentham, in his work on Judicial Evidence, proposes a plan so extraordinary that it is but justice to give it in his own words. After observing that a correct mode of expressing degrees of persuasion and probative force is an object of great importance, but that the language current among the body of the people is in this particular most deplorably defective, &c. (*m*), he proceeds thus (*n*)—"Conceive the possible degrees of persuasion, positive and negative together, to be thus expressed: the degrees of positive persuasion—persuasion affirming the existence of the fact in question—constitute one part of the scale, which call the positive part. The degrees of negative persuasion—persuasion disaffirming or denying the existence of the same fact—constitute the other part of the scale, which call the negative part. Each part is divided into the same number of degrees: suppose ten, for ordinary use. Should the occasion present a demand for any ulterior degree of accuracy, any degree that can be required may be produced at pleasure, here, as in other ordinary applications of arithmetic, by multiplying this ordinary number of degrees in both parts by any number, so it be the same in both cases: the number *ten* will be found the most convenient multiplier. In this case, instead of 10, the number of degrees on each scale will be 100 or 1000, and so on. At the bottom of each part of the scale stands 0: by which is denoted the non-existence of any degree of persuasion on either side: the state which the mind is in, in the case in which the affirmative and the negative, the existence and the non-existence of the fact in question, present themselves to it, as being exactly as probable the one as the other. Such is the simplicity of this mode of expression, that no material image representative of a scale seems necessary to the employment of it. The scale being under-

(*m*) Benth. Jud. Ev. vol. i. p. 74.

(*n*) *Id.* 75—80.

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stood to be composed of ten degrees—in the language applied by the French natural philosophers to thermometers, a *decigrade* scale—a man says, my persuasion is at 10 or 9, &c. affirmative, or at 10 or 9, &c. negative: as, in speaking of temperature, as indicated by a thermometer on the principle of Fahrenheit, a man says, the mercury stood at 10 above, or at 10 below, 0. If ulterior accuracy be regarded as worth pursuing, to the *decigrade* substitute (giving notice) a *centigrade* scale: and if that be not yet sufficient, a *milligrade*. * * * * * * * * * For want of an adequate mode of expression, the real force of testimony in a cause has hitherto been exposed to perpetual misrepresentations. * * * * * * Old measures of every kind receive additional correctness; new ones are added to the number: the electrometer, the calorimeter, the photometer, the eudiometer, not to mention so many others, are all of them so many productions of this age. Has not justice its use as well as gas?"

Fallacy of it.

§ 72. The most singular circumstance connected with this fantastic suggestion is, its being accompanied by an admission that after all the only true scale is an *infinite* one, but that that is unfortunately inapplicable (*o*). The fallacy of the whole has been thus ably exposed in a note by Dumont, the French translator of Bentham (*p*). "I do not dispute the correctness of the author's principles; and I cannot deny that, where different witnesses

(*o*) 1 Benth. Jud. Ev. 74, 75, and 100.

(*p*) We have taken this on the authority of the Editor of Bentham's Jud. Ev. vol. i. pp. 106—8, A.D. 1827. Continental writers, admirers of Bentham's works in general, condemn his thermometer of persuasion. Besides the above note of Dumont, see Bonnier, Traité des Preuves, § 244, 2nd Ed., who calls it a "testimoniomètre," and rather fancifully observes, "Soumise au scalpel de l'analyse, l'intime conviction se flétrit; de même que les fleurs d'un herbier se dessèchent et perdent leurs vives couleurs."

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have different degrees of belief, it would be extremely desirable to obtain a precise knowledge of these degrees, and to make it the basis of the judicial decision; but I cannot believe that this sort of perfection is attainable in practice. I even think, that it belongs only to intelligences superior to ourselves, or at least to the great mass of mankind. Looking into myself, and supposing that I am examined in a court of justice on various facts, if I cannot answer 'yes' or 'no' with all the certainty which my mind can allow, if there be degrees and shades, I feel myself incapable of distinguishing between two and three, between four and five, and even between more distant degrees. I make the experiment at this very moment; I try to recollect who told me a certain fact; I hesitate, I collect all the circumstances, I think it was A. rather than B.: but should I place my belief at No. 4, or No. 7? I cannot tell. A witness who says, 'I am doubtful,' says nothing at all, in so far as the judge is concerned. It serves no purpose, I think, to inquire after the degrees of doubt (*q*). But these different states of belief, which, in my opinion, it is difficult to express in numbers, display themselves to the eyes of the judge by other signs. The readiness of the witness, the distinctness and certainty of his answers, the agreement of all the circumstances of his story with each other,—it is this which shews the confidence of the witness in himself. Hesitation, a painful searching for the details, successive connexions of his own testimony,—it is this which announces a witness who is not at the *maximum* of certainty. It belongs to the judge to appreciate these differences, rather than to the witness himself, who would be greatly embarrassed if he had to fix the numerical amount of his own belief. Were this scale adopted, I should be apprehensive that the authority of the testimony would often be inversely as the wisdom of the witnesses. Reserved men—men

(*q*) Acc. Domat, part. 1, liv. 3, tit. 6, sect. 3, § xiv.

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who knew what doubt is—would, in many cases, place themselves at inferior degrees, rather than at the highest; while those of a positive and presumptuous disposition, above all, passionate men, would almost believe they were doing themselves an injury, if they did not take their station immediately at the highest point. The wisest thus leaning to a diminution, and the least wise to an augmentation, of their respective influence on the judge, the scale might produce an effect contrary to what the author expects from it. * * * It appears to me, that, in judicial matters, the true security depends on the degree in which the judges are acquainted with the nature of evidence, the appreciation of testimony, and the different degrees of proving power. These principles put a balance into their hands, in which witnesses can be weighed much more accurately than if they were allowed to assign their own value; and even if the scale of the degrees of belief were adopted, it would still be necessary to leave judges the power of appreciating the intelligence and morality of the witnesses, in order to estimate the confidence due to the numerical point of belief at which they have placed their testimony."

Application of the calculus of probabilities to judicial testimony.

§ 73. The mathematical calculus of probabilities, or "Doctrine of Chances," has, as is well known, been found of essential service in various political and social matters, apparently unconnected with the exact sciences. The modern system of Life Insurance, in particular, almost owes its existence to that branch of mathematics. Among other things, the notion presented itself of applying the calculus of probabilities to estimating the value of testimony given in courts of justice (*r*),—an

(*r*) Laplace, Essai Philosophique sur les Probabilités, 5th Ed.; Lacroix, Calcul des Probabilités, Paris, 1833; Poisson, Recherches sur la Probabilité des Jugemens en matière civile et en matière criminelle, &c. Paris, 1837; and the article "Probability" in the Encyclopædia Britannica.

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object sought to be accomplished by adapting the established formulæ, which express the probability of the concurrence of independent events, to the probability of the evidence of concurring witnesses or independent facts. But no real analogy exists in this respect between judicial testimony and life insurance or other matters of a similar nature. In the latter a series of facts and figures, collected by long and accurate observation, and carefully registered, supply data that bring the subject within the range of mathematical analysis, a condition which wholly fails when we attempt to deal *practically* with the former(*s*). Still even here the calculus of pro-

(*s*) The fundamental principle on which the calculus of probabilities rests is, that *in order to determine the probability of an event, we must take the ratio of the favourable chances or cases to all the possible cases which in our judgment may occur.* Let $m+n$ be the total number of possible cases, all equally likely; m represents the number of cases in favour of event A., and n those of event B.; the probability of event A. will be $\frac{m}{m+n}$, and that of B. $\frac{n}{m+n}$. It is also evident that unity is the symbol of certitude; for, by hypothesis, one of the events must happen; and adding the probabilities of A. and B., we have $\frac{m+n}{m+n}=1$. *The probability of the concurrence of independent events is,* not the sum of their simple probabilities, but their componnd ratio, i. e. *the product of the probabilities of each considered separately.* Thus, if $\frac{m}{m+n}$ be the probability of event A., $\frac{m'}{m'+n'}$ that of B., $\frac{m''}{m''+n''}$ that of C., &c., the probability of their concurrence will be expressed by this formula—

$$\left(\frac{m}{m+n}\right)\left(\frac{m'}{m'+n'}\right)\left(\frac{m''}{m''+n''}\right)$$

&c. When the total number of possible cases, and their ratio to the number of favourable chances, are unknown, still approximate values of the probabilities of events can be obtained, by having recourse to *hypotheses* framed according to the resnlts of a previons number of trials or observed events.

The calculus of probabilities has been applied to the subject of *human testimony*, by supposing that, in a certain number of depositions, say $m+n$, a witness has told truth in m cases, and falsehood in n cases; although, in order to determine with accuracy the probability of the fact to which he deposes, the intrinsic, or *à priori* probability of that fact itself must be taken into the account. Let there be two witnesses, A. and B.; and snppose that in m cases A. has

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babilities is not without its use. "La plupart de nos jugemens," says one of the most distinguished writers upon it(*t*), "étant fondés sur la probabilité des témoignages, il est bien important de la soumettre au calcul. La chose, il est vrai, devient souvent impossible, par la difficulté d'apprécier la véracité des témoins, et par le grand nombre de circonstances dont les faits qu'ils attestent, sont accompagnés. Mais on peut dans plusieurs cas résoudre de problèmes qui ont beaucoup d'analogie avec les questions qu'on se propose, et dont les solutions peuvent être regardées comme des approximations propres à nous guider, et à nous garantir des erreurs et des dangers auxquels de mauvais rai-

spoken truth, and in n cases falsehood, the analogous numbers in the case of B. being m' and n'; the probability of the truth of the testimony of A. is $\frac{m}{m+n}$, and that of B. $\frac{m'}{m'+n'}$. So long as it is not known whether they are deposing to the same thing or not, the probability that both are right is $\frac{mm'}{(m+n)\ (m'+n')}$; but when they agree about the same thing, the terms mn' and $m'n$ belong to impossible cases, and the above expression becomes $\frac{mm'}{mm'+nn'}$. By a similar process we shall find that the probability of the falsehood of their joint testimony is $\frac{nn'}{mm'+nn'}$. The same principle can easily be extended to any number of witnesses, p, so that supposing the probability of the veracity of each to be the same, we shall have $m=m'$, $n=n'$, &c., and the expressions last obtained will become $\frac{m^p}{m^p+n^p}$ and $\frac{n^p}{m^p+n^p}$. If instead of witnesses we have *circumstances*, the probability of any fact, as, for instance, the guilt or innocence of an accused person, is calculated in the same way, treating each circumstance as a testimony, and will be the compound result of the simple probabilities arising from each of those circumstances; though in estimating strictly the probability of guilt resulting from each circumstance, the probability of the truth or falsehood of the witnesses deposing to that circumstance must be taken into the account.

For the deduction of the above formulæ, see the works cited in the last note. The most cursory inspection of these expressions will show how impossible it would be for the *practical* purposes of justice to assign even approximate values to the quantities m, m', n and n', to say nothing of the other probabilities necessary to be computed.

(*t*) Laplace, *ut suprà*, p. 137.

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sonnemens nous exposent. Une approximation de ce genre, lorsqu'elle est bien conduite, est toujours préférable aux raisonnemens les plus spécieux." The calculus of probabilities has accordingly been applied in English treatises on evidence to hypothetical states of facts, to illustrate the value of different *kinds* of evidence (*u*).

2. Double principle of decision.

§ 74. The remaining abuse, if less monstrous than the other (*x*), is to the full as formidable; and is sure to be found wherever the rules of evidence are too technical or artificial, and the decision of questions of fact is entrusted to a judge, instead of a jury or other casual tribunal. Although no tribunal could venture *systematically* to disregard a rule of evidence, however absurd or mischievous—this would be setting aside the law—tribunals may occasionally suspend the operation of such a rule without risk, and even with applause, when its enforcement would shock common sense; and the upright man who has the misfortune to be judge under such a system, either relaxes the rule in those cases, or carries it out at all hazards under all circumstances. The unjust judge, on the contrary, converts this very strictness of the law into an engine of despotism, by which he is enabled to administer expletive or attributive justice at pleasure; while the world at large see nothing but the exoteric system, little suspecting that there is in the back ground an esoteric one with which only the initiated are acquainted. When a rule of this kind militates against an obnoxious party, the judge declares that he is bound to administer the law as he finds it, that it is not for him to overturn the decisions of his predecessors, or sit in judgment on the wisdom of the legislature: and to blame him for this is impossible. But when the party against whom the rule presses is a favoured one—the judge discovers that laws were made

(*u*) See 1 Stark. Evid. 568, 3rd Ed.; and *infrà*, bk. 3, pt. 2, ch. 2.
(*x*) *Vide suprà*, § 69 *et seq.*

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for the benefit of men, not their ruin, that technical objections argue an unworthy cause, and that the first duty of every tribunal is to administer substantial justice at any price. The badness of the rule is so evident that it is difficult to find fault with this either: and by thus shifting the urn from which the principle of his decision is taken, the judge sits, like the fabled Jove (*y*), the absolute arbiter of almost every case that comes before him (*z*).

Conclusion.

§ 75. We have thus endeavoured to explain the principles on which judicial evidence is founded, to demonstrate its utility and necessity, and point out the chief abuses to which it is liable. The peculiar system existing in any particular place will of course depend much on the substantive municipal law with which it is connected, the customs and habits of society, and the standard of truth among the population. In this it only shares the fate of laws in general: of which it has been truly said, "Perpetua lex est, nullam legem humanam ac positivam perpetuam esse" (*a*). "Leges naturæ perfectissimæ sunt et immutabiles: Leges humanæ nascuntur, vivunt, et moriuntur" (*b*).

(*y*) Δοιοὶ γάρ τε πίθοι κατακείαται ἐν Διὸς οὔδει
Δώρων, οἷα δίδωσι, κακῶν· ἕτερος δὲ, ἐάων·
Ὧ μὲν καμμίξας δώῃ Ζεὺς τερπικέραυνος,
Ἄλλοτε μέν τε κακῷ ὅγε κύρεται, ἄλλοτε δ' ἐσθλῷ, &c.
Ιλ. Ω. 527.

Thus translated by Pope:—

Two urns by Jove's high throne have ever stood,
The source of evil one, and one of good;
From thence the cup of mortal man he fills,
Blessings to these, to those distribute ills; &c.

(*z*) This is what Bentham calls "The Donble Fountain Principle;" Jud. Ev. bk. 8, ch. 23. But how strange he could not see that its most fatal enemy is a jury; and that it must reign supreme under his own judicial system, where questions both of law and fact would be determined by a single judge, with the nominal check of appeal to a superior, equally disposed to apply the principle in question?

(*a*) Bacon, Max. *sub reg.* 19.

(*b*) *Calvin's case*, 7 Co. 25, a.

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OBJECT AND DIVISION OF THE WORK.

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Object of the work.

§ 76. THE judicial evidence of any system of jurisprudence may be defined, as that branch of its adjective law which ascertains the nature, determines the admissibility, controls or modifies the effect of the evidence adduced before its tribunals, and regulates their practice relative to the offering, opposing, and receiving it. Having, therefore, in the Introduction treated of evidence in general, and of judicial evidence as distinguished from it, we proceed to the more immediate object of the present work—the system of judicial evidence established by the common law of England, for the use of its ordinary and regular tribunals, on the trial of facts in question before them—known in practice by the title of "The Law of Evidence." It is necessary to be thus precise, for several other kinds of evidence are observable in our jurisprudence. By sundry statutes, also, peculiar modes of proof are either prescribed or permitted in certain proceedings.

Division of the work.

§ 77. "The Law of Evidence" will be best understood by treating of it under the four following heads:

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and the present work is divided into four Books accordingly.

1. The English Law of Evidence in general.
2. Instruments of Evidence.
3. Rules regulating the admissibility and effect of Evidence.
4. Forensic Practice and examination of Witnesses.

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BOOK I.

THE ENGLISH LAW OF EVIDENCE IN GENERAL.

Division of the Subject.

§ 78. THIS Book consists of two Parts. In the first it is proposed to take a general view of the English law of evidence; the second will be devoted to the history of its rise and progress, with some observations on its actual state and prospects. Division of the subject.

PART I.

GENERAL VIEW OF THE ENGLISH LAW OF EVIDENCE.

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Grounds of judicial evidence in general.

§ 79. THE necessity for judicial evidence, as distinguished from natural or moral evidence, has been shewn, in the Introduction to this work, to arise out of the nature of municipal law and the functions of judicial tribunals. The limitations which can properly be imposed by municipal law on tribunals investigating facts were there traced to the following principles. First, The maxim "Optima est lex, quæ minimum relinquit arbitrio judicis" (*a*);—the power of tribunals would be absolute if bounds were not set to their discretion in declaring facts proved or disproved. Secondly, The necessity for speedy action in tribunals; which renders it part of the duty of the legislator to supply rules for the disposal of all matters which come before them, however difficult or even impossible it may be to get at the truth. Thirdly, The evils that would arise from considering only the direct, and disregarding the collateral, consequences of decisions. Lastly, the difference between the investigation of historical truth and of the

(*a*) Bac. de Augm. Scient. lib. 8, c. 3, tit. 1, Aphorism. 46.

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facts which come in question in courts of justice; the characteristic dangers to which the latter is exposed requiring that characteristic securities be framed to meet them. It was further shewn, that while these principles may be, and frequently have been, overstepped and pushed beyond their legitimate limits, the *chief* abuses to be guarded against by the legislator in dealing with judicial evidence are twofold. First, The creation of a technical and artificial system of belief, dependant on the presence of evidence in some particular quantity, without regard to its weight and credibility; and, Secondly, The establishment of rules too stringent and technical to be always enforced, which a dishonest or prejudiced tribunal would consequently be enabled without danger to itself to insist on or relax, according to its interest, pleasure or caprice.

Characteristic features of the English system.

§ 80. The characteristic features of the English system of judicial evidence, like those of every other system, are essentially connected with the constitution of the tribunal by which it is administered; and may be stated as consisting of three great principles. 1. The admissibility of evidence is matter of *law*, but the weight or value of evidence is matter of *fact*. 2. Matters of law; including the admissibility of evidence; are proper to be determined by a *fixed*, matters of fact by a *casual*, tribunal. 3. In determining the admissibility of evidence, the production of the *best evidence* should be exacted. We propose to consider them in their order; and will afterwards notice two other remarkable features of our system, less characteristic indeed, but exercising a most powerful influence in extracting truth and securing rectitude of decision; namely, the mode in which evidence is received by our tribunals, and the publicity of our judicial proceedings.

1. The admis-

§ 81. The first of the three may be dispatched in a

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sibility of evidence is matter of *law*, the weight of evidence is matter of *fact*.

few words; as the least reflexion will shew how absurd it would be in any legislator to attempt to lay down rules for estimating the credit due to witnesses, or the probability of every fact which may present itself in the innumerable combinations of nature and human action (*b*). The reliance to be placed on the statements of witnesses, and the inferences to be drawn from facts proved, must therefore be left for the most part to the sagacity of tribunals. But even here, for the reasons already given, some limits must be imposed; and the same causes which render artificial rules of evidence essential to the administration of justice shew that those rules ought, as far as possible, to partake of the nature of other rules of municipal law (*c*). And however constituted the tribunal, but especially when it is of the mixed form that will be described presently, the true line seems to be that the rules of law on this subject ought in general to be confined to the *admissibility* of proof, leaving its *weight* to the appreciation of the tribunal.

(*b*) The following passage from the Digest is commonly cited in proof and illustration of this:—"D. Hadrianus Vivio Varo Legato provinciæ Ciliciæ rescripsit, eum, qui judicat, magis posse scire, quanta fides habenda sit testibus. Verba epistolæ hæc sunt: 'Tu magis scire potes, quanta fides habenda sit testibus: qui, et cujus dignitatis, et cujus æstimationis sint: et qui simpliciter visi sint dicere, utrum unum eundemque meditatum sermonem attulerint; an ad ea, quæ interrogaveras, ex tempore verisimilia responderint.' Ejusdem quoque Principis extat rescriptum ad Valerium Verum de excutienda fide testium, in hæc verba: 'Quæ argumenta ad quem modum probandæ cuique rei sufficiant, nullo certo modo satis definiri potest: sicut non semper, ita sæpe sine publicis monumentis cujusque rei veritas deprehenditur: alias numerus testium, alias dignitas et auctoritas: alias veluti consentiens fama confirmat rei, de qua quæritur, fidem. Hoc ergo solum tibi rescribere possum summatim, non utique ad unam probationis speciem cognitionem statim alligari debere: sed ex sententia animi tui te æstimare oportere, quid aut credas, aut parum probatum tibi opinaris.' Idem Divus Hadrianus Junio Rufino Proconsuli Macedoniæ rescripsit, 'testibus se, non testimoniis crediturum.'" Dig. lib. 22, tit. 5, l. 3, §§ 1, 2. 3.

(*c*) Introd. pt. 2.

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2. Common law tribunal for deciding issues of fact.

§ 82. Secondly. The ordinary common law tribunal for deciding issues of fact (*d*), consists of a court composed of one or more judges, learned in the law and armed with its authority; assisted by a jury of twelve men, unlearned in the law, taken indiscriminately from among the people of the county where the venue is laid, and possessing property to a defined amount. No "recusatio judicis" is allowed so far as the court is concerned; but jurors are required to be "omni exceptione majores," and may be challenged by the litigant parties, for want of the requisite qualifications, as well as for certain causes likely to exercise an undue influence on their decision; in addition to which, persons accused of treason or felony are allowed to challenge peremptorily, without cause, the former as many as thirty-five, the latter twenty, of the panel. The court is charged with the general conduct of the proceedings—it decides all questions of law and practice, including the admission and rejection of evidence; and when the case is ripe for adjudication, sums it up to the jury—explaining the questions in dispute, with the law as bearing on them, pointing out on whom the burden of proof lies, and recapitulating the evidence, with such comments and observations as may seem fitting. Moreover, as the

(*d*) In some few instances the trial is by the court, without a jury: i.e. trial by the record, inspection, certificate, and witnesses. 3 Blackst. Com. 330. The 9 & 10 Vict. c. 95, s. 69, empowers judges of county courts to try questions of fact without a jury, provided neither party to the action requires a jury to be summoned. So, by the 21 & 22 Vict. c. 27, s. 5, the court of chancery may order any question of fact, arising in any suit or proceeding, to be tried before the court itself, without a jury; and the 17 & 18 Vict. c. 125, s. 1 (as amended by 21 & 22 Vict. c. 74, s. 5), enables the court or a judge to try causes without a jury, if the parties by consent in writing empower them to do so: but the verdict is not to be questioned on the ground of its being against the weight of evidence. And by sects. 3 and 6 the court or a judge, or a judge at nisi prius, may refer to an arbitrator chosen by the parties, or to an officer of the court, cases where the matter in dispute consists of matters of mere account, which cannot conveniently be tried in the ordinary way.

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decisions of tribunals on facts ought to be based on reasonable evidence, and when the facts are undisputed the decision as to what is reasonable is matter of law, and consequently within the province of the court (*e*); it follows that it is the duty of the court to determine whether, assuming as true all the evidence adduced by the party on whom the burden of proof lies, the jury could reasonably, i. e., without acting unreasonably in the eye of the law, decide in his favour upon it, and if not, then to withhold the case from their consideration (*f*): a principle commonly enunciated by the phrase,— "Whether there be *any* evidence, is a question for the judge. Whether *sufficient* evidence, is for the jury" (*g*). On the other hand the decision of the facts in issue is the exclusive province of the jury; who are therefore to hear the evidence and comments made on it, to determine the credit due to the testimony of the witnesses, and draw all requisite inferences of fact from the evidence. Errors committed by the court, either in matters of law or in admitting or rejecting evidence, and occasionally even in matters of practice, are corrected by application to a superior tribunal; and if a jury misconduct themselves to the defeat of justice, as, for instance, if they determine by lot what verdict to give, or before giving it hear other evidence besides that which was adduced in open court, their verdict will be avoided. In civil cases the court above will award a new trial if the jury deliver a verdict clearly founded on a misunderstanding of the law (*h*), or find what is called a perverse verdict, i. e. refuse to listen to the law as

(*e*) *Michell* v. *Williams*, 11 M. & W. 205, 216, per Alderson, B.

(*f*) *Toomey* v. *The Brighton Railway Company*, 3 C. B., N. S. 146; *Cornman* v. *The Eastern Counties Railway Company*, 5 Jurist, N. S. 657; *Hodges* v. *Ancrum*, 11 Exch. 214; *Avery* v. *Bowden*, 6 E. & B. 962, 973-4; *Hall* v. *Featherstone*, 4 Jurist, N. S. 813, 814, per Martin, B.

(*g*) *Carpenters' Company* v. *Hayward*, 1 Dougl. 374, 375, per Buller, J. See also 1 Phil. Ev. 4, 10th Ed.; *R.* v. *Smith*, Leigh & Cave, C. C. 607.

(*h*) *The Att.-Gen.* v. *Rogers*, 11 M. & W. 670.

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correctly laid down to them by the judge (*i*). So if they find a verdict against the evidence, i. e. a verdict not merely erroneous in the judgment of the court above, but so unequivocally against the weight of evidence that it ought not to be allowed to stand (*k*). New trials are also sometimes granted when a party has been taken by surprise at the trial, or has discovered important evidence, unknown to him at the time it took place, and on some other grounds to which it is unnecessary to refer. In criminal cases, generally speaking, points of law must be reserved by the judge, and new trials are not grantable. This division of the functions of the judge and jury is expressed by the maxim, "ad quæstionem facti non respondent judices; ad quæstionem juris non respondent juratores" (*l*). Thus, where the defendant, in an action for malicious prosecution, gives evidence to prove reasonable and probable cause, it is for the jury to find the facts; and it is for the judge to decide, as matter of law, whether the facts proved amount to reasonable and probable cause (*m*). But the above maxim must be taken with these limitations. 1st. Facts on which the *admissibility* of evidence depends are determined by the court, not by the jury (*n*). Thus, whether a sufficient foundation is laid for the reception of secon-

(*i*) *Mould* v. *Griffiths*, 8 Jurist, 1010, per Parke, B.; *Saunders* v. *Davies*, 16 Jur. 481, per Pollock, C. B.; *Hawkins* v. *Alder*, 18 C. B. 640, per Jervis, C. J.; *King* v. *Poole*, Ca. temp. Hardw. 23, 26, per Hardwicke, C. J.

(*k*) "The discretion of the court to grant a new trial must be a *judicial*, and not an *arbitrary* discretion": per Glyn, C. J., in *Wood* v. *Gunston*, Sty. 466. See also *Creed* v. *Fisher*, 9 Exch. 472.

(*l*) This maxim is frequent in our old books; Co. Litt. 155 b, 226 a, 295 b; 8 Co. 155 a; 9 *Id.* 13 a, 25 a; 11 *Id.* 10 b; Vaugh. 149, &c. &c.; but many of our readers will probably be surprised to find that it has also been long known on the continent. See Bonnier, Traité des Preuves, § 74.

(*m*) *Panton* v. *Williams* (in Cam. Scac.), 2 Q. B. 169.

(*n*) *Bartlett* v. *Smith*, 11 M. & W. 483, 485-6, per Parke, B.; *Cleave* v. *Jones*, 7 Exch. 421; *Bennison* v. *Jewison*, 12 Jur. 485; *Doe* d. *Jenkins* v. *Davies*, 10 Q. B. 314; *Corfield* v. *Parsons*, 1 Cr. & M. 730; *Welstead* v. *Levy*, 1 Moo. & R. 138; *Boyle* v. *Wiseman*, 11 Exch. 360.

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dary evidence is for the judge (*o*), and if the competency of a witness turns on any disputed fact he must decide it (*p*). So, whether a confession in a criminal case is receivable (*q*); and whether on a charge of homicide a dying declaration was made by the deceased at a time when he was under the conviction of his impending death, in which case alone it is admissible (*r*). And it seems the better opinion that, for the purpose of determining such collateral questions, the judge is not restricted to *legal* evidence (*s*). 2ndly. The jury thus far *incidentally* determine the law, that their verdict is usually general, i. e. guilty, or not guilty, for the plaintiff, or for the defendant—such a verdict being manifestly compounded of the facts and the law as applicable to them. And although the jury have always a right to find a verdict in this form, yet if they feel any doubt about the law, or distrust their own powers of applying it, they may find the facts specially, and leave the court to pronounce judgment according to law on the whole matter (*t*).

Principles on which it is founded.

§ 83. Having given this sketch of the course of "trial by judge and jury," we should here dismiss the subject, were not a clear perception of the principles on which it is founded indispensable to a right understanding of our rules of judicial evidence. Looking at the different sorts of tribunals which have existed in different ages and countries, we shall find this distinction running

(*o*) *Bennison* v. *Jewison*, 12 Jur. 485, per Alderson, B.

(*p*) *Bartlett* v. *Smith*, 11 M. & W. 483, 486, per Parke, B.; *R.* v. *Hill*, 2 Den. C. C. 254.

(*q*) *R.* v. *Warringham*, 2 Den. C. C. 447, note; 15 Jur. 318.

(*r*) *Reg.* v. *Jenkins*, L. Rep., 1 C. C. 187; *Bartlett* v. *Smith*, 11 M. & W. 483, 486, per Parke, B.; *Bennison* v. *Jewison*, 12 Jur. 485, per Alderson, B.

(*s*) *Duke of Beaufort* v. *Crawshay*, H. & R. 638, and the authorities there referred to.

(*t*) See on this subject, Litt. sects. 366, 367, 368; Co. Litt. 226 b and 228 a; Hargrave's note (5) to Co. Litt. 155 b; Finch, Law, 399; 3 Blackst. Com. 377, 378; 4 *Id.* 361; and 32 Geo. 3, c. 60.

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through them, viz., that some are *fixed* and some *casual* (*u*). By "fixed" tribunals are meant those composed of persons appointed, either permanently or for a definite time, to take cognizance of causes of a specified kind; and they most usually consist of men who have made legal matters the subject either of their study or practice: "casual," are when the tribunal is called together for the occasion and dismissed when the cause is decided; and properly should consist of private individuals possessed of no peculiar legal knowledge. Now each of these has its advantages and disadvantages. For the decision of questions of *abstract law* the superiority of the fixed tribunals is too obvious to need remark; and even for questions of *fact* a superior education, and most probably higher order of intellect, and a practical acquaintance from the experience of years with men in general, with the tricks of witnesses, and the sophistries of advocates, might seem at first sight almost equally decisive in its favour. To this may be added, that the single judge seems the natural and primitive form of tribunal (*x*), as autocracy seems

(*u*) Paley's Moral and Political Philosophy, bk. 6, ch. 8.

(*x*) Whether it is the most *general* may be questioned. In the early stages of society, and indeed in all countries on peculiar emergencies, causes are decided by persons of station and authority, without reference to any supposed special qualification on their part: it is only as civilization advances and laws become more complicated, that the study and application of them assumes the form of a distinct profession. Among the Jews, criminal cases, at least, were tried by the elders of the city at its gate. See Dent. xxi. 19, &c., xxii. 15, xxv. 7; Ruth, iv. 1—11; Josh. xx. 4; Jerem. xxvi. 10, &c.; Amos, v. 10—15, &c. And the practice of the two greatest nations of antiquity is thus stated by one of the greatest of historians. "The free citizens of Athens and Rome enjoyed, in all criminal cases, the invalnable privilege of being tried by their country. * * * The task of convening the citizens for the trial of each offender became more difficult, as the citizens and the offenders continually multiplied; and the ready expedient was adopted of delegating the jurisdiction of the people to the ordinary magistrates, or to extraordinary *inquisitors*. In the first ages these questions were rare and occasional. In the beginning of the seventh century of Rome they were made perpetual. * * * By these *inquisitors* the trial was pre-

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the natural and primitive form of government. But as was said by the great Athenian legislator with reference to the latter (*y*), "Absolute monarchy is a fair field, but it has no outlet" (*z*), so the evils necessarily incident

pared and directed; but they conld only pronounce the sentence of the majority of *judges*, who with some truth, and more prejudice, have been compared to the English juries. To discharge this important though burdensome office, an annnal list of ancient and respectable citizens was formed by the prætor. After many constitutional struggles, they were chosen in equal numbers from the senate, the equestrian order, and the people; four hundred and fifty were appointed for single questions; and the various rolls or *decurias* of judges must have contained the names of some thousand Romans, who represented the judicial authority of the state. In each particular cause, a sufficient number was drawn from the urn; their integrity was guarded by an oath; the mode of ballot secured their independence; the suspicion of partiality was removed by the mutual challenges of the accuser and defendant. * * * In his civil jurisdiction, the prætor of the city was trnly a judge, and almost a legislator; but as soon as he had prescribed the action of law, he often referred to a delegate the determination of the fact. * * * But whether he acted alone, or with the advice of his council, the most absolute powers might be trusted to a magistrate who was annually chosen by the votes of the people. The rulcs and precautions of freedom have required some explanation; the order of despotism is simple and inanimate. Before the age of Justinian, or perhaps of Diocletian, the decurias of Roman judges had sunk to an empty title; the humble advice of the assessors might be accepted or despised; and in each tribunal the civil and criminal jurisdiction was administered by a single magistrate, who was raised and disgraced by the will of the emperor." Gibbon, Decline and Fall of the Roman Empire, ch. 44, *vers. finem.* See also Heinec. ad Pand. pars 2, § 2; Plutarch in Vit. Solon. The ancient Germans appear to have had a system strongly resembling our own (Savigny, Gesch. des Römischen Rechts im Mittelalter, 1 Band, 4 Kap.; *Id.* System des hentigen Römischen Rechts, 1 Bnch, 3 Kap.; Colquhoun's Summary of the Roman Civil Law, pt. 1, § 119; and it seems that, for the mode of trial by a single judge, so long prevalent on the continent of Europe, we are chiefly indebted to the lower empire, whose practice the civilians and canonists copied, perhaps extended, in preference to that of Athens, and of Rome before she lost her liberties.

(*y*) Πρὸς τὰς φιλυς εἶπεν (ὡς λέγεται) καλὸν μὲν εἶναι τὴν τυραννίδα χωρίον, οὐκ ἔχειν δὲ ἀπόβασιν. Plutarch. in Vit. Solon.

(*z*) In modern times it has been compared to a high pressure steam engine without a safety-valve. See

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to the former immensely outweigh its value. Even as regards accuracy of decision, the advantage in deciding facts is on the side of the casual tribunal. From their position in life its members are likely to know more of the parties and witnesses, and are consequently better able to enter into their views and motives; and from the novelty of their situation they bring a freshness and earnestness to the inquiry, which the constant habit of deciding, adjudicating, and punishing fades and blunts more or less in the mind of every judge. But the great danger of a fixed tribunal is methodical or artificial decision—a sort of decision by routine, arising out of the faculty of generalizing, classifying, and distinguishing, which is so valuable in the investigation of questions of mere law. This is thus clearly stated by the Marquis Beccaria, whose testimony is the more valuable from being that of a foreigner (*a*). "I deem that the best judicial system which associates with the principal judges assessors, not selected, but chosen by lot; for in such matters ignorance which judges by sense is safer than science which judges by opinion. Where the law is clear and precise, the duty of the tribunal is limited to ascertaining the existence of facts; and although, in seeking the proofs of crime, ability and dexterity are

letter signed "an Hertfordshire Incumbent," Times, June 23, 1860.

(*a*) "Io credo ottima legge quella, che stabilisce assessori al giudice principale, presi dalla sorte, e non dalla scelta; perchè in questo caso è più sicura l'ignoranza che giudica per sentimento, che la scienza che giudica per opinione. Dove le leggi sono chiare e precise, l' officio di un giudice non consiste in altro che di accertare un fatto. Se nel cercare le prove di un delitto richiedesi abilità e destrezza, se nel presentarne il risultato è necessario chiarezza e precisione; per giudicarne dal risultato medesimo, non vi si richiede che un semplice ed ordinario buon senso, meno fallace che il sapere di un giudice assuefatto a voler trovar rei, e che tutto riduce ad un sistema fattizio adottato da' suoi studj." Beccaria, Dei Delitti e delle Pene, § 7. See also the observations of Abbott, C. J., in *R.* v. *Burdett*, 4 B. & A. 95, 162, and Paley's Moral and Political Philosophy, bk. 6, ch. 8.

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required; although, in summing up the result of those proofs, perspicuity and precision are indispensable; still, in order to draw a conclusion from them, nothing more is required than plain ordinary good sense—less fallacious than the learning of a judge accustomed to seek the proofs of guilt, and who reduces everything to an artificial system formed by study." And here it is essential to remember that the consequences of the errors of the casual tribunal are immensely less. Theirs are mostly errors of *impulse*, and their consequences almost entirely confined to the actual case in which they are committed. The errors of a fixed tribunal, on the contrary, are the errors of *system*, and their effects lasting and general. Their decisions, proceeding as they do from persons in authority, will, especially if ever so slightly involving a point of law, be reported, or, what is even more objectionable, remembered without being reported, and form precedents by which future tribunals will be swayed. Nor is even this the worst—the judge to whom the precedent made by his predecessor is cited is safe from censure if he follows it, while on the other hand, being erroneous in itself, he may without danger disregard it: so that, if corrupt or prejudiced, he may take as his guide either the true principles of proof or the previous wrong decision, and thus give judgment for the plaintiff or for the defendant at pleasure (*b*).

§ 84. But the invincible objection to fixed tribunals,—i. e. fixed tribunals entrusted to decide both law and facts,—exists in the difficulty, not to say impossibility, of keeping them pure, when the questions at issue are of great weight and importance. The judge's name being known to the world, indicates to the evil-disposed litigant the person to whom his bribe can be offered, or

(*b*) Introd. § 74.

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on whose mind influence may be brought to bear; and a frightful temptation is held out to the executive to secure the condemnation of political enemies, by placing on the seat of justice persons of complying morals or timorous dispositions. We commonly hear the purity of the British bench ascribed exclusively, or nearly so, to the statutes 12 & 13 Will. 3, c. 2, s. 3, and 1 Geo. 3, c. 23, which rendered judges irremovable at the pleasure of the crown; not remembering that, however valuable those enactments are on many grounds, *appointment* to the bench is as much in the hands of the crown as ever it was; and that even under the old system men were found, like Gascoigne, Hale, and others, who defied it when in the discharge of their duty. But where, as among us, the ultimate fate of every case is pronounced by a body the individual members of which are unknown until the moment of trial, all this is removed; and in modern times it is the packed jury, not the corrupt judge, which upright citizens have to dread.

§ 85. The description already given of our common law tribunal shows it to be one of a compound nature—partly fixed and partly casual—and which will be found so constructed as to secure very nearly all the advantages of each of the opposing systems, while it avoids their characteristic dangers (*c*). By confiding to the judge the decision of all questions of law and practice, it secures the law and the practice from being altered by any mistake, or even misconduct, of the jury; by treating as matter of law, and consequently within his province, the admissibility of evidence, and the sufficiency as a legal basis of adjudication of any that may be received, it prevents the jury from acting without evidence, or on illegal evidence; and by entrusting him with the general oversight of the proceedings and the

(*c*) Paley's Moral and Political Philosophy, bk. 6, ch. 8.

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duty of commenting upon the evidence, reaps the benefit of his knowledge and experience. But by taking out of his hands the actual decision on the facts and the application of the law to them, it cuts up mechanical decision by the roots, prevents artificial systems of proof from forming, and secures the other advantages of a casual tribunal. Besides, the difference that exists between the judge and jury in station, acquirements, habits and manner of viewing things, not only enables them to exert on each other a mutual and very salutary control, but confers an enormous moral weight on their joint action. When, for instance, the condemnation of a criminal is pronounced both by the representative of the law and a number of persons chosen indifferently from the body of the community, the blow descends on him and the other evil disposed members of it with a force which it never could have, if based solely on the reasoning of the one, or the consultation of the other. To these considerations must be added the constitutional protection which the presence of a jury affords to the free citizen—a matter too well known to need much explanation. Suffice it to say that it rests on the principle —a principle by no means peculiar to us (*d*)—of leaving a portion of the judicial authority in the hands of the people, instead of vesting the whole in some exclusive or professional body. Now it is one of the popular fallacies of the day—one which is frequently put forward, and still more frequently insinuated, by the enemies of the jury system, and too often incautiously admitted by its friends—that that constitutional protection is the sole advantage of this mode of trial, and that that protection is required in criminal cases only. The law of England, however, as we trust will appear from what has been already said, has established the trial by judge and jury, in the conviction that it is the mode best calculated to

(*d*) See *suprà*, § 83, note (*x*).

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ascertain the truth, and do the greatest amount of justice, in every sense of that word, in the great majority of cases; the constitutional protection afforded by it being only a collateral, although most important, consequence of the general arrangement. So obvious is this that some of those who have attacked the jury system in the main, concede that it ought to be retained in cases where the liberty of the subject may come in question (*b*). But who could define beforehand what those cases are? The most ordinary case, criminal or civil, may disclose in its progress a most important constitutional question, wholly imperceptible at its outset; and we may add by way of illustration, that two of the most important constitutional questions that ever presented themselves to a tribunal were raised, one in a special action on the case (*c*), the other in an action for libel (*d*). "The distinction," says an eminent jurist of the last century, "between the office of judge and jury seems to claim our utmost respect. May this wise distribution of power between the two long continue to flourish, unspoiled, either by the proud encroachment of ill-designing judges, or the wild presumption of licentious juries" (*e*).

3. Rules regulating the admissibility of evidence.

§ 86. 3. We come to the third great feature of the common law mode of proof—the general principles by which the admissibility of evidence is governed. And here it is to be observed that the rules of evidence are of three kinds—1st. Those which relate to evidence *in causâ*, i. e. evidence adduced to prove the questions in dispute. 2nd. Those affecting evidence *extrà causam*, or that which is only used to test the accuracy of media of proof. 3rd. Rules of forensic practice respecting evidence. Now it is to the first of these that the term

1. Evidence in causâ.

2. Evidence extrà causam.

3. Rules of forensic proof.

(*b*) Bentham's Principles of Judicial Procedure, ch. 23, § 1.

(*c*) *Ashby* v. *White*, Ld. Raym. 938.

(*d*) *Stockdale* v. *Hansard*, 9 A. & E. 1.

(*e*) Hargrave's Co. Lit. 155 b, note 5.

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"Rules of evidence" most properly applies—much evidence which would be rejected if tendered in causâ, being perfectly receivable as evidence extrà causam; and there are few trials in which this sort of evidence does not play an important part. Again, the judge has a certain latitude allowed him with respect to the rules of forensic proof. He may ask any questions, in any form, and at any stage of the cause, and to a certain extent even allow parties or their advocates to do so. This does not mean that he can receive illegal evidence at pleasure; for if such be left to the jury a new trial will be granted, even though the evidence were extracted by questions put from the bench; but it is a power necessary to prevent justice being defeated by technicality, to secure indicative evidence (*f*), and in criminal cases to assist in fixing the amount of punishment. And it should be exercised with due discretion. "Discretio est discernere *per legem*, quid sit justum" (*g*): "In maximâ potentiâ minima licentia" (*h*): "Discretion is a science or understanding to discern between falsity and truth, between wrong and right, between shadows and substance, between equity and colourable glosses and pretences, and not to do according to their wills and private affections" (*i*).

ONE GENERAL RULE OF EVIDENCE in causâ—*The best evidence must be given.*

§ 87. Confining our attention therefore to evidence *in causâ*—it was said by a most eminent judge in a most important case, that "The judges and sages of the law have laid it down that there is but ONE GENERAL RULE OF EVIDENCE, *the best that the nature of the case will admit*" (*j*). And Lord Chief Baron Gilbert, to whom principally we are indebted for reducing our law of evi-

(*f*) For "indicative" evidence, see *infrà*.

(*g*) Co. Litt. 227 b; 2 Inst. 56; 4 Inst. 41; 6 Q. B. 700.

(*h*) Hob. 159.

(*i*) 5 Co. 100 a. See also 7 Co. *Calvin's case*, 27 a, and 10 Co. 140 a; 19 How. St. Tr. 1089; 4 Burr. 2539.

(*j*) Lord Hardwicke, Ch., in *Omychund* v. *Barker*, 1 Atk. 21, 49.

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dence into a system, says, "The first and most signal rule, in relation to evidence, is this, that a man must have the utmost evidence, the nature of the fact is capable of" (*k*): "the true meaning of the rule of law, that requires the greatest evidence that the nature of the thing is capable of, is this: That no such evidence shall be brought, which ex naturâ rei supposes still a greater evidence behind in the party's own possession and power" (*l*). And in another old work of authority (*m*): "It seems in regard to evidence to be an uncontestable rule, that the party, who is to prove any fact, must do it by the *highest* evidence of which the nature of the thing is capable." Similar language is to be found in most of our modern books (*n*). The important rule in question has, however, been very often misunderstood; partly from the ambiguous nature of the language in which it is enunciated, and partly from its being commonly accompanied by an illustration which has been confounded with the rule itself. "If," says Lord Chief Baron Gilbert (*o*), "a man offers a copy of a deed or will where he ought to produce the original, this carries a presumption with it that there is something more in the deed or will that makes against the party, or else he would have produced it; and therefore the proof of a copy in this case, is not evidence." This is undoubtedly true, but it is a great mistake to suppose it the full extent of the rule—"Exempla illustrant non restringunt legem" (*p*). Sometimes, again, it has been misunderstood as implying that the law requires in every case the most convincing or credible evidence which could be produced under the circumstances. But all the authorities agree that this is not its meaning (*q*);

This rule very often misunderstood.

(*k*) Gilb. Ev. 4, 4th Ed.
(*l*) Gilb. Ev. 16, 4th Ed.
(*m*) Bac. Abr. I. Ed. 1736.
(*n*) 3 Blackst. Comm. 368; B. N. P. 293; Peake's Ev. 8; 2 Evans' Poth. 147-148; 1 Greenl. Ev. § 82, 7th Ed., &c.
(*o*) Gilb. Ev. 16, 4th Ed.
(*p*) Co. Litt. 24 a.
(*q*) See the authorities in note (*n*).

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as further appears from the maxims, that "there are no degrees of parol evidence," and "there are no degrees of secondary evidence." Suppose an indictment for an assault: or, to make the case stronger, for wounding with intent to murder, (an offence capital until the 24 & 25 Vict. c. 100, and still punishable with penal servitude for life): the injured party, though present in court, is not called as a witness, and it is proposed to prove the charge by the evidence of a person who witnessed the transaction at the distance of a mile, or even through a telescope; this evidence would be *admissible*, because it is connected with the act—the senses of the witness having been brought to bear upon it;—and the not producing, what would probably be more satisfactory, the evidence of the party injured, is mere matter of observation to be addressed to the jury. Again, by "secondary evidence" is meant derivative evidence of the contents of a written document; and it is a principle that such is not receivable unless the absence of the "primary evidence," the document itself, is satisfactorily accounted for (*r*). But when this has been done, any form of secondary evidence is receivable (*s*): thus, the parol evidence of a witness is admissible though there is a copy of the document, and the probability that it would be more trustworthy than his memory is only matter of observation (*t*).

Three chief applications of it.

§ 88. The true meaning of this fundamental principle will be best understood by considering the *three* chief applications of it. Evidence, in order to be receivable, should come through proper instruments, and be in general original, and proximate. With respect to the first of these: with the exception of a few matters which either the law notices judicially, or are deemed too no-

(*r*) *Infrà*, bk. 3, pt. 2, ch. 3.
(*s*) *Doe* d. *Gilbert* v. *Ross*, 7 M. & W. 102.
(*t*) *Id.* 106, 107.

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torious to require proof, the judge and jury must not decide facts on their personal knowledge; and should be in a state of legal ignorance of everything relating to the questions in dispute before them, until established by legal evidence, or legitimate inference from it (*u*). "Non refert quid notum sit judici, si notum non sit in formâ judicii" (*v*). It is obvious that if they were allowed to decide on impressions, or on information acquired elsewhere, not only would it be impossible for a superior tribunal, the parties, or the public, to know on what grounds the decision proceeded, but it might be founded on common rumour or other forms of evidence, the very worst instead of the best.

1. Judge and jury must not decide facts on their personal knowledge.

§ 89. The next branch of this rule is that which exacts original and rejects derivative evidence—that no evidence shall be received which shews on its face that it only derives its force from some other which is withheld (*x*). "Meliùs (or 'satiùs') est petere fontes quàm sectari rivulos" (*y*). The terms "primary" and "secondary" evidence are used by our law in the limited sense of the original and derivative evidence of written documents; the latter of which is receivable when, by credible testimony, the existence of the primary source has been established and its absence explained. But derivative evidence of other forms of original evidence is in general rejected absolutely; as where supposed oral evidence is delivered through oral, and the various other sorts of evidence comprised in practice under the very inadequate phrase "hearsay evidence" (*z*).

2. Exaction of original and rejection of derivative evidence.

(*u*) *Infrà*, bk. 3, pt. 1, ch. 1; Introd. § 38.

(*v*) 3 Bulst. 115.

(*x*) Per Parke, B., in delivering the judgment of the Court of Exchequer in *Doe* d. *Welsh* v. *Langfield*, MS. Hil. Vac. 1847, reported 16 M. & W. 497; *Doe* d. *Gilbert* v. *Ross*, 7 M. & W. 102, 106, per Parke, B.; *Macdonnell* v. *Evans*, 11 C. B. 930, 942, per Maule, J.

(*y*) Co. Litt. 305 b; 8 Co. 116 b; 10 Co. 41 a.

(*z*) *Infrà*, bk. 3, pt. 2, ch. 4.

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3. There must be an open and visible connection between the principal and the evidentiary facts.

§ 90. The remaining application of this great principle which we propose to notice at present seems based on the maxim, "In jure non remota causa, sed proxima spectatur" (*a*). It may be stated thus, that, as a condition precedent to the *admissibility* of evidence, either direct or circumstantial, the law requires *an open and visible connection* between the principal and evidentiary facts, whether they be ultimate or subalternate. This does not mean a *necessary* connection—that would exclude all *presumptive* evidence—but such as is reasonable, and not latent or conjectural. In this our judicial evidence partakes of the very essence of all sound municipal law, and preserves the lives, liberties and properties of men, by placing an effectual rein on the imagination of those entrusted with the administration of justice, and preventing decision on remote inferences and fancied analogies (*b*).

§ 91. The true character and value of the important principle now under consideration is, however, more easily conceived than described. In dealing with natural evidence the connection between the principal and evidentiary facts must be left to instinct (*c*); in legal evidence this is replaced by a sort of legal instinct, or legal sense, acquired by practice; and the old observation "Multa multò exercitamentis facilius quàm regulis percipies" (*d*) becomes perfectly applicable. A few instances, however, may serve to illustrate. On a criminal trial the confession of a third party, not produced as a witness, that he was the real criminal and the accused innocent, although certainly not destitute of natural weight, would be rejected, from its remoteness and want of connection with the accused, and the manifest danger of collusion and fabrication. So, if a man

(*a*) Bac. Max. of the Law, Reg. 1; 12 East, 652; 14 M. & W. 483; 6 B. & S. 881; H. & R. 61; 18 C. B. 379; 18 Jur. 962.

(*b*) Introd. § 38.

(*c*) 1 Benth. Jud. Ev. 44.

(*d*) 4 Inst. 50.

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writes in his pocket-book that he owes me 5*l.*, it is reasonable evidence against him that he owes me that sum, although it is quite possible he may be mistaken. But suppose he were to write in it that I owe him 5*l.*, that statement, though possibly quite true, is no evidence against me, for the want of connection is obvious. Again, the bad character or reputation of an accused person, although strong moral, is not legal evidence against him, unless he sets up his character as a defence to the charge (*e*). The sound policy which requires that even the worst criminals shall receive a fair and unprejudiced trial renders this rule indispensable. So, a man's appearance and physiognomy are not unfrequently excellent guides to his character and disposition, but they ought not to be, and they are not receivable as legal evidence against him (*f*).

§ 92. But whether a given fact, bearing indirectly on a matter in issue, should be received as circumstantial, or rejected as conjectural evidence, is often a question of extreme difficulty. One test, perhaps, is to consider whether any imaginable number of pieces of evidence such as that tendered could be made the ground of decision: for it is the property of a chain of genuine circumstantial evidence, that, however inconclusive each link is in itself, the concurrence of all the links may amount to proof, often of the most convincing kind. Suppose, in a case of murder by a cutting instrument, no eye-witness being forthcoming, the criminative facts against the accused (*g*) were: 1. He had had a quarrel

(*e*) See this subject very fully considered, in *Reg.* v. *Rowton*, 34 L. J., M. C. 57.

(*f*) Some of the French lawyers thonght they ought, "On allait jusqu'à mettre au nombre de ces indices" (i. e. indices éloignés) "*la mauvaise physiognomie de l'accusé, ou le vilain nom qu'il portait.* Mais c'étaient là, il faut en convenir, des indices très-éloignés." Bonnier, Traité des Preuves, § 652.

(*g*) This expression is used in 11 & 12 Vict. c. 46, s. 1; 30 & 31 Vict. c. 35, s. 6.

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with the deceased a short time previous. 2. He had been heard to declare that he would be revenged on the deceased. 3. A few days before the murder the accused bought a sword or large knife, which was found near the corpse. 4. Shortly after the murder he was seen at a short distance from the spot, and coming away from it. 5. Marks corresponding with the impressions made by his shoes were traceable near the body. 6. Blood was found on his person soon after the murder. 7. He absented himself from his home immediately after it. 8. He gave inconsistent accounts of where he was on the day it took place. The weakness of any one of these elements, *taken singly*, is obvious, but collectively they form a very strong case against the accused. Now suppose, instead of the above chain of facts, the following evidence was offered. 1. The accused was a man of bad character. 2. He belonged to a people notoriously reckless of human life, and addicted to assassination. 3. On a former occasion he narrowly escaped being convicted for the murder of another person. 4. Much jealousy and ill feeling existed between his nation and that to which the deceased belonged. 5. On the same spot, a year before, one of the latter was murdered by one of the former in exactly the same way. 6. The murderer had also robbed the deceased, and the accused was well known to be avaricious. 7. He had been overheard in his sleep to use language implying that he was the murderer (*g*). 8. All his neighbours believed him guilty, or, supposing the case one of public interest, both houses of parliament had voted addresses to the crown in which he was assumed to be the guilty party. These and similar matters, however multiplied, could never generate that rational conviction on which alone it is safe to act, and accordingly not one of them would be received as legal evidence.

(*g*) *Infrà*, bk. 3, pt. 2, ch. 7.

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§ 93. It may be objected, and, indeed, Bentham's Treatise on Judicial Evidence is founded on the notion, that by exclusionary rules like the above, much valuable evidence is wholly sacrificed (*h*). Were such even the fact, the evil would be far outweighed by the reasons already assigned for imposing a limit to the discretion of tribunals in declaring matters proved or disproved (*i*): but when the matter comes to be carefully examined, it will be found that the evidence in question need seldom be lost to justice; for however dangerous and unsatisfactory it would be as the basis of final adjudication, it is often highly valuable as "indicative evidence," i. e. evidence not in itself receivable but which is "*indicative*" of better (*j*). Take the case of derivative evidence—a witness offers to relate something told him by A.; this would be stopped by the court; but he has indicated a genuine source of testimony, A., who may be called or sent for. So a confession of guilt which has been made under undue promise of favour or threat of punishment is inadmissible by law, yet any facts discovered in consequence of that confession, such, for instance, as the finding of stolen property, are good legal evidence (*k*). Again, no one would think of treating an anonymous letter as legal evidence against a party not suspected of being its author, yet the suggestions contained in such letters have occasionally led to disclosures of importance. In tracing the perpetrators of crimes, also, conjectural evidence is often of the utmost importance, and leads to proofs of the most satisfactory kind, sometimes even amounting to demonstration. It is chiefly, however, on

Indicative evidence.

(*h*) See that work, *passim*.

(*i*) *Suprà*, § 90, and Introd. § 38.

(*j*) The phrase "indicative evidence" is used in this sense by Bentham, 1 Jud. Ev. 37, and bk. 6, ch. 11, sect. 4, as well as in his "Principles of Judicial Procedure, &c." ch. 11, sects. 1 and 3. In one place he calls it "Evidence of evidence," 3 Jud. Ev. 554.

(*k*) *R.* v. *Lockhart*, 2 East, P. C. 658; *R.* v. *Warickshall*, 1 Leach, C. L. 263; *R.* v. *Gould*, 9 C. & P. 364; *R.* v. *Griffin*, R. & R. C. C. 151.

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inquisitorial proceedings—such as coroners' inquests, inquiries by justices of the peace before whom persons are charged with offences, and the like—that the use of "indicative evidence" is most apparent: though even these tribunals cannot act on it.

The *rules* of evidence are in general the same in civil and criminal proceedings.

§ 94. The *rules* of evidence are in general the same in civil and criminal proceedings (*l*); and bind alike crown and subject, prosecutor and accused, plaintiff and defendant, counsel and client. There are however some exceptions. Thus the doctrine of estoppel has a much larger operation in the former (*m*). So an accused person may, at least if undefended by counsel, rest his defence on his own unsupported statement of facts, and the jury may weigh the credit due to that statement (*n*); whereas in civil cases nothing must be opened to the jury which it is not intended to substantiate by proof (*o*). Again, confessions or other self-disserving statements of prisoners will be rejected if made under the influence of undue promises of favour, or threats of punishment (*p*); but there is no such rule respecting similar statements in civil cases. So, although both these branches of the law have each their peculiar presumptions, still the technical rules regulating the burden of proof cannot be followed out in all their niceties when they press against accused persons (*q*).

Difference as to the *effect* of evidence in civil and criminal proceedings.

§ 95. But there is a strong and marked difference as to the *effect* of evidence in civil and criminal proceed-

(*l*) *R.* v. *Burdett*, 4 B. & A. 95, 122, per Best, J.; *Attorney-General* v. *Le Merchant*, 2 T. R. 201, n.; *R.* v. *Murphy*, 8 C. & P. 297, 306; *Leach* v. *Simpson*, 5 M. & W. 309, 312, per Parke, B.; 25 Ho. St. Tr. 1314; 29 *Id.* 764.

(*m*) *Infrà*, bk. 3, pt. 2, ch. 7.

(*n*) *Infrà*, bk. 4, pt. 1.

(*o*) *Stevens* v. *Webb*, 7 C. & P. 60, 61; *Duncombe* v. *Daniell*, 8 *Id.* 222, 227.

(*p*) *Infrà*, bk. 3, pt. 2, ch. 7.

(*q*) Huberus, Præl. Jur. Civ. lib. 22, tit. 3, n. 16. See per Lord Kenyon, C. J., in *R.* v. *Hadfield*, 27 Ho. St. Tr. 1353.

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ings. In the former, a mere preponderance of probability, due regard being had to the burden of proof, is a sufficient basis of decision (*r*); but in the latter, especially when the offence charged amounts to treason or felony, a much higher degree of assurance is required. The serious consequences of an erroneous condemnation both to the accused and society, the immeasurably greater evils which flow from it than from an erroneous acquittal, have induced the laws of every wise and civilized nation to lay down the principle, though often lost sight of in practice, that the persuasion of guilt ought to amount to a moral certainty (*s*); or, as an eminent judge expressed it, "Such a moral certainty as convinces the minds of the tribunal, as reasonable men, beyond all reasonable doubt" (*t*). The expression "moral certainty" is here used in contradistinction to physical certainty, or certainty properly so called (*u*); for the physical possibility of the innocence of any accused person can never be excluded. Take the strongest case, —a number of witnesses of character and reputation, and whose evidence is in all respects consistent, depose to having seen the accused do the act with which he is charged, still the jury only believe his guilt on two presumptions, either or both of which may be fallacious, viz. that the witnesses are neither deceived themselves nor deceiving them (*x*); and the freest and fullest confessions of guilt have occasionally turned out untrue (*y*). Even if the jury were themselves the witnesses, there

(*r*) Plowd. 412; 1 Greenl. Ev. 13 a, 7th Ed.; Mac Nally's Ev. 578; *Cooper* v. *Slade*, 6 Ho. Lo. Cas. 772, per Willes, J.

(*s*) See Introd. § 49. The juror's oath seems framed with a view to the above distinction. In civil cases he is sworn "well and truly to try the issue joined between the parties, &c.," whilst in treason or felony his oath is that he "shall well and truly try, *and true deliveranee make*, between our sovereign lady the Queen and the prisoner at the bar, &c."

(*t*) Parke, B., in *R.* v. *Sterne*, Surrey Sum. Ass. 1843, MS.

(*u*) Introd. § 6.

(*x*) Domat, Lois Civ. pt. 1, liv. 3, tit. 6, Préamb.; 2 Ev. Poth. 332; Rosc. Civ. Ev. 25, 9th Ed.

(*y*) *Infrà*, bk. 3, pt. 2, ch. 7. 693

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would still remain the question of the identity of the person whom they saw do the deed with the person brought before them accused of it (*z*); and identity of person is a subject on which many mistakes have been made (*a*). The wise and humane maxims of law, that it is safer to err in acquitting than condemning (*b*), and that it is better that many guilty persons should escape than one innocent person suffer (*c*), are, however, often perverted to justify the acquittal of persons of whose guilt no *reasonable* doubt could exist; and there are other maxims which should not be forgotten, "Interest reipublicæ ne maleficia remaneant impunita" (*d*), "Minatur innocentes qui parcit nocentibus" (*e*).

§ 96. Again, the psychological question of the *intent* with which acts are done, plays a much greater part in criminal than in civil proceedings. The maxim "Actus non facit reum, nisi mens sit rea" (*f*), runs through the criminal law, although in some instances a criminal intention is conclusively presumed from certain acts (*g*); while in civil actions to recover damages for misconduct or neglect, it is in general no answer that the defendant did not intend mischief (*h*)—"Excusat aut extenuat delictum in capitalibus, quod non operatur idem in civilibus" (*i*). There are, however, exceptions to this, and whether an act was done *knowingly* often becomes an important consideration in civil suits (*k*). It may

(*z*) See M. 49 Hen. VI. 19 B. pl. 26.

(*a*) *Infrà*, bk. 3, pt. 2, ch. 6.

(*b*) 2 Hale, P. C. 290.

(*c*) 2 Hale, P. C. 289; 4 Blackst. Comm. 358.

(*d*) Jenk. Cent. 1, Cas. 59. See also 4 Co. 45 a.

(*e*) 4 Co. 45 a. See also Jenk. Cent. 3, Cas. 54.

(*f*) Co. Litt. 247 b; 3 Inst. 107; 4 How. St. Tr. 1403; T. Raym. 423; 7 T. R. 514; 2 East, 104; 1 Den. C. C. 389; 5 Jur. N. S. 649.

(*g*) *Infrà*, bk. 3, pt. 2, ch. 2.

(*h*) M. 6 Edw. IV. 7 B. pl. 18; Hob. 134; T. Raym. 422; Willes, 581; 2 East, 104; 16 M. & W. 442.

(*i*) Bacon, Max. Reg. 7.

(*k*) 4 Co. 18 b; *May* v. *Burdett*, 9 Q. B. 101; *Jackson* v. *Smithson*, 15 M. & W. 563; *Card* v. *Case*,

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be laid down as a general principle, that so as a man has a right by law to do an act, the intention with which he does it is immaterial (*l*). "Nullus videtur dolo facere, qui suo jure utitur" (*m*). All contracts, likewise, are founded on an intention of the parties, either expressed by themselves or implied by law from circumstances.

How far the rules of evidence may be relaxed by consent.

§ 97. And here a question presents itself, whether and how far the rules of evidence may be relaxed *by consent?* In criminal cases, at least in treason and felony, it is the duty of the judge to see that the accused is condemned according to law, and the rules of evidence forming part of that law; no admissions from him or his counsel will be received. On the other hand, however, much latitude in putting questions and making statements is given, de facto if not de jure, to prisoners who are undefended by counsel. So, no consent could procure the admission of evidence which public policy requires to be excluded; such as secrets of state and the like. Moreover, no admission at a trial will dispense with proof of the execution of certain attested instruments, though the instrument itself may be admitted before the trial with the view to save the trouble and expense of proving it (*n*). Subject, however, to these and some other exceptions, the general principles, "Quilibet potest renunciare juri pro se introducto" (*o*)—"Omnis consensus tollit errorem" (*p*)—seem to apply to evidence in civil cases; and much inadmissible evidence is constantly received in practice, because the opposing counsel either deems it not worth while to object,

5 C. B. 622; *Hudson* v. *Roberts*, 6 Exch. 697; *Worth* v. *Gilling*, L. R., 2 C. P. 1.

(*l*) *Oakes* v. *Wood*, 2 M. & W. 791; *Simmons* v. *Lillystone*, 8 Exch. 431; *Ridgway* v. *The Hungerford Market Company*, 3 A. & E. 171.

(*m*) Dig. lib. 50, t. 17, l. 55.

(*n*) *Infrà*, bk. 3, pt. 2, ch. 7.

(*o*) Co. Litt. 99 a, 166 a, 223 b; 10 Co. 101 a; 2 Inst. 183; 4 Bl. Com. 316.

(*p*) Co. Litt. 126 a.

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or thinks its reception will be beneficial to his client. It has, however, been held, that where a valid objection is taken to the admissibility of evidence it is discretionary with the judge whether he will allow the objection to be withdrawn (*q*).

§ 98. Whether the rules respecting the incompetency of witnesses could be dispensed with by consent, seems never to have been settled. In *Pedley* v. *Wellesley* (*r*), Best, C. J., said that Lord Mansfield once permitted a plaintiff to be examined with his own consent (*s*); and although some of the judges doubted the propriety of that permission, he (the Chief Justice) thought it was right. In *Dewdney* v. *Palmer* (*t*), where, after a witness had been sworn on behalf of the plaintiff, it was proposed to shew by evidence that he was the real plaintiff, the judge refused to allow this course; and his ruling was affirmed by the Court of Exchequer, on the ground that the objection ought to have been taken on the voir dire: but in a subsequent case of *Jacobs* v. *Layborn* (*u*), the same court, consisting of Lord Abinger, C. B., and Rolfe, B., overruled this, and held that objections to competency might be made at any stage of the trial (*v*). So, arbitrators are bound by the legal rules of evidence (*w*); yet on submissions to arbitration previous to the 14 & 15 Vict. c. 99, it was generally made part of the rule of court that the parties might

(*q*) *Barbat* v. *Allen*, 7 Exch. 609.

(*r*) 3 C. & P. 558.

(*s*) The case here referred to is thought to be *Norden* v. *Williamson*, 1 Taunt. 378, Lord Mansfield being put by mistake for C. J. Mansfield. See per Parke, B., in *Barbat* v. *Allen*, 7 Exch. 612.

(*t*) 4 M. & W. 664.

(*u*) 11 M. & W. 685. See however the observations of Parke, B., in *Yardley* v. *Arnold*, 10 M. & W. 145.

(*v*) See *R.* v. *Whitehead*, 35 L. J., M. C. 186.

(*w*) *Att.-Gen.* v. *Davison*, 1 M'Cl. & Y. 160; *Banks* v. *Banks*, 1 Gale, 46.

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be examined as witnesses. In the case already cited of *Pedley* v. *Wellesley* (*x*), a female was called as witness for the plaintiff, and it appeared that after being served with the subpœna she had married the defendant. On her evidence being objected to, it was replied that a party to a suit cannot by any act, laudable or otherwise, deprive his adversary of the testimony of his witness; but Best, C. J., said he should allow the witness to be examined if the defendant consented, not otherwise. In a much older case (*y*), where it was proposed by a man's consent to examine his adversary's wife as a witness, Lord Hardwicke, C. J., said, "The reason (*z*) why the law will not suffer a wife to be a witness for or against her husband, is to preserve the peace of families, and therefore I shall never encourage such a consent;" and she was not examined. Such evidence has been rejected in America, on the ground that the interest of the husband in preserving the confidence reposed in the wife is not the sole foundation of the rule; the public having also an interest in the preservation of domestic peace, which might be disturbed by her testimony notwithstanding his consent, and that there is a very great temptation to perjury in such cases (*a*). To this latter argument it may be observed, that there is a much greater temptation to perjury when an accomplice in a case of treason or felony is examined as a witness against his companions; or an heir apparent comes forward as a witness for his father, the title to whose lands is in question.

§ 99. All these cases took place before the 14 & 15 Vict. c. 99 had rendered the parties to a suit competent witnesses in general. After the passing of that statute,

(*x*) 3 Car. & P. 558.

(*y*) *Barker* v. *Dixie*, Ca. temp. Hardw. 264.

(*z*) See on this subject, *infrà*, bk. 2, pt. 1, ch. 2.

(*a*) 1 Greenl. Ev. § 340, 7th Ed.

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and previous to the 16 & 17 Vict. c. 83 (*b*), the question arose whether the wives of such parties were also rendered competent; which, after some conflict of opinion, was resolved in the negative (*c*). In *Barbat* v. *Allen* (*d*), the plaintiff's case having been proved by a witness, the defendants' counsel proposed to call the wife of one of the defendants, to prove fraud, by the admissions of that witness in her presence. The plaintiff's counsel objected, and Pollock, C. B., refused to admit her testimony. Subsequently the plaintiff's counsel offered to waive the objection; but the judge, notwithstanding, refused to receive the evidence. A verdict having been found for the plaintiff, a rule was granted to set it aside on the grounds, first, that the statute had rendered the wife a competent witness; and, secondly, that, if not, her testimony ought to have been received when the objection was waived. This rule having been argued, and several of the preceding cases with some others cited, the court discharged it: holding unanimously, that the statute had not rendered the wife competent; and, even supposing the objection could be waived by consent, the allowing it to be waived was discretionary with the judge. But the members of the court were not agreed as to whether the objection could be waived. Parke and Martin, BB., said that, if it were necessary to decide that question, they would like further time for consideration. Platt, B., said he was of the same opinion as Parke, B., and for the same reasons. Pollock, C. B., however, delivered his judgment more at length, as follows:—"In my opinion, a judge is bound to administer the whole law of evidence; and although a practice has crept in of admitting inadmis-

(*b*) Which rendered husbands and wives competent witnesses for or against each other in civil cases. See *infrà*, bk. 2, pt. 1, ch. 2.

(*c*) See *Stapleton* v. *Crofts*, 18 Q. B. 367; *Barbat* v. *Allen*, 7 Exch. 609, and *M'Neillie* v. *Aeton*, 17 Jur. 661.

(*d*) 7 Exch. 609.

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sible evidence by consent, still that is a matter for the discretion of the judge. The cases which have been adverted to with reference to waiving the objection to an interested witness scarcely apply; for, strictly speaking, all objections to the competency of a witness, on the score of interest, ought to be taken on the voir dire, before the witness is sworn. Therefore, in those cases where persons have been examined by consent, although they had an avowed interest, it was only going back to the old law; and, after the witness was sworn, there was, in truth, no objection to waive. I think that it is in the discretion of the judge whether he will admit the evidence objected to; otherwise, if the parties agreed that a witness should give his evidence unsworn, or if a person openly declared himself an atheist, I do not see why those persons might not be examined. The consent of the parties will not entitle them to use an affidavit which is inadmissible. Some additional light may be thrown on the subject by this circumstance,—that when parties are to be examined in a court of law, under an order of a court of equity, the order is positive that the witnesses shall be examined, which would be useless unless the court had power to reject them notwithstanding the consent of the parties. I think that the judge, in his discretion, has a right to insist on the law of England being administered; and, when any departure from it is proposed, to say to the parties, 'You shall not make a law for yourselves.'" In a subsequent case, however, of *Hodges* v. *Lawrence* (*e*), where an application by a defendant to remove a cause from a county court was resisted, on the ground that the plaintiff's principal witness was his wife, and consequently he would be deprived of her testimony if the cause were brought into a superior court, the Court of Exchequer granted the application on the defendant's

(*e*) 17 Jur. 421.

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consenting that the wife should be examined as a witness.

Two other remarkable features of the English system.

§ 100. We now come to consider the two other remarkable features of the English system of judicial evidence, which were mentioned early in this Part (*f*), namely, the vivâ voce examination of witnesses, and the publicity of judicial proceedings. Our law of evidence bears a general resemblance to other systems in its safeguards or securities for the truth of testimony—like them it has its political sanction of truth, an oath or affirmation, its legal forms of preappointed evidence, its incompetency of witnesses, and in a few cases its rules requiring a plurality. But of all checks on the mendacity and misrepresentations of witnesses, the most effective is the requiring their evidence to be given *vivâ voce*, in presence of the party against whom they are produced, who is allowed to "cross-examine" them, i. e. ask of them such questions as he thinks may serve his cause. The great tests of the truth of any narrative are the consistency of its several parts, and the possibility and probability of the matters narrated (*g*). Stories false in toto are comparatively rare (*h*)—it is by misrepresentation, suppression of some matters, and addition of others, that a false colouring is given to things, and it is only by a searching inquiry into the surrounding circumstances that the whole truth can be brought to light. Now, although much valuable evidence is often elicited by questions put from the tribunal, and although the story told by a witness frequently discloses of itself some inconsistency or improbability fatal to the whole, it is chiefly from the party against whom false testimony is directed, that we can expect to obtain the most efficient materials for its detection. He, above all others, is interested in exposing it, and is the person best

Checks on witnesses.

1. Vivâ voce examination.

(*f*) *Suprà*, § 80. (*g*) Introd. § 24. (*h*) *Id.* § 26.

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acquainted, often the only person acquainted, with the facts as they really have occurred. Besides, as the answer to one question frequently suggests another, it is extremely difficult for a mendacious witness, to come prepared with his story ready fitted to meet any question which may be thus put to him on a sudden (*i*). The other great check is the *publicity* of our judicial proceedings—our courts of justice being open to all persons; and in criminal cases, the by-standers are even invited by proclamation to come forward with any evidence they may possess affecting the accused. The advantages of this are immense. "In many cases," observes an author who is amply quoted in the present work (*j*), "say rather in most (in all except those in which a witness, bent upon mendacity, can make sure of being apprised with perfect certainty, of every person to whom it can by any possibility have happened to be able to give contradiction to any of his proposed statements), the publicity of the examination or deposition operates as a check upon mendacity and incorrectness. * * * Environed, as he sees himself, by a thousand eyes, contradiction, should he hazard a false tale, will seem ready to rise up in opposition to him from a thousand tongues; many a known face, and every unknown one, presents to him a possible source of detection, from whence the truth he is struggling to suppress, may, through some unsuspected channel, burst forth to his confusion."

2. Publicity of judicial proceedings.

The practice of the civil (*k*) and canon laws, as is

(*i*) The advantages of the common law mode of interrogating witnesses, as compared with that made use of in the civil and canon laws, and formerly in our ecclesiastical and equity courts, &c., are ably shewn by Bentham in the 3rd Book of his Judicial Evidence.

(*j*) 1 Benth. Jud. Ev. 552. See that work, bk. 2, ch. 10, sect. 2, where the advantages of the publicity of judicial proceedings are very clearly pointed out.

(*k*) By the civil law we mean that form of Roman law which, during so many centuries, prevailed on the Continent of Europe. The practice of the ancient Romans in a great degree resembled our own. See Acts, xxv.

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well known, differs wholly from ours in these respects. Witnesses are examined in private by a judge or officer of the court, and their depositions, reduced into form, transmitted to the tribunal by which the cause is to be tried. And absurd as this may seem it is not without its defenders, who condemn our common law system altogether, and contend that secrecy and written deposition constitute the very essence of justice. All their arguments, however, when examined, come to this, that it is wise to sacrifice certain and constant good in order to avoid occasional and exceptional evil. Where, say they, witnesses are called on to explain their answers, and one question is followed up by another, a false witness *may* adapt his answers to circumstances; *therefore*, let every witness who happens to be misunderstood—all men are not masters of language, and in the hands of the ablest of us it often fails to communicate our thoughts—be deprived of opportunity of setting himself right with his interrogator and the tribunal. Again, an honest, but timid or weak-minded witness, *may* be so affected by the novelty of his situation, or so brow-beaten by his cross-examiner, as to be unable to give evidence, or perhaps even made to contradict himself; *therefore*, say the partisans of the civil and canon law practice, let the feeling of shame that so often deters men from stating in public falsehoods which they would unblushingly state in private, be erased from the minds of all witnesses who present themselves in courts of justice; and let us shut out the incalculable light thrown on every sort of verbal testimony by the demeanour of the person who gives it. The most limited experience will testify, that *what* a man says is of very small account indeed compared with his *manner* of saying it. Besides, when justice is defeated by cross-

16; Dig. lib. 22, tit. 5, l. 3, §§ 3 & 4; Quintilian, Inst. Orat. lib. 5, c. 7, and Devotus, Inst. Canon. vol. 2, lib. 3, tit. ix. §§ 17 & 18, 5th Ed.

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examination pushed to excess, the chief fault rests with the judge, whose duty it is to re-assure and encourage the witness. And after all, brow-beating and annoying a witness are very different from discrediting him; we should remember that the cross-examination takes place in presence of a judge and jury, who are on the watch to discover whether the confusion or vacillation of the witness is attributable to false shame, mistake, or mendacity. Most of the advantages of secret examination, without its dangers, are attainable by examining the witnesses out of the hearing of each other—a practice constantly adopted in courts of common law, when combination among them is suspected, or the testimony of one is likely to exercise a dangerous influence over others.

Exceptions to the rule requiring the personal attendance of witnesses at trials.

§ 101. But however valuable the principle which requires the presence of witnesses at a trial, the strict enforcement of the rule under all circumstances would be an impediment to justice. Either from the evils of an unbending adherence to it being less felt in early times, or from the comparatively slender attention paid to evidence in general by our ancient lawyers, certain it is that the common law made little or no provision on this subject; but large improvements have been effected by modern legislation. After the union with Scotland and the complete establishment of our Indian empire, the mischiefs arising out of the imperfections of the ancient system became too great to be overlooked; and the 13 Geo. 3, c. 63, contains several provisions directed to this object. In the first place, it enacts (*l*), that "in all cases of indictments or informations, laid or exhibited in the Court of King's Bench, for misdemeanors or offences committed in India; it shall be lawful for his Majesty's said court, upon motion to be

(*l*) Sect. 40.

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made on behalf of the prosecutor, or of the defendant or defendants, to award a writ of mandamus, requiring the chief justice and judges of the supreme court of judicature for the time being, or the judges of the Mayor's Court at Madras, Bombay or Bencoolen, as the case may require, who are hereby respectively authorized and required accordingly, to hold a court with all convenient speed, for the examination of witnesses, and receiving other proofs concerning the matters charged in such indictments or informations respectively; and, in the meantime, to cause such public notice to be given of the holding the said court, and to issue such summons or other process, as may be requisite for the attendance of witnesses, and of the agents or counsel, of all or any of the parties respectively, and to adjourn, from time to time, as occasion may require: and such examination as aforesaid shall be then and there openly and publicly taken vivâ voce in the said court, upon the respective oaths of witnesses, and the oaths of skilful interpreters, administered according to the forms of their several religions; and shall, by some sworn officer of such court, be reduced into one or more writing or writings on parchment, &c., and shall be sent to his Majesty, in his Court of King's Bench, closed up, and under the seals of two or more of the judges of the said court, and one or more of the said judges shall deliver the same to the agent or agents of the party or parties requiring the same; which said agent or agents (or, in case of his or their death, the person into whose hands the same shall come) shall deliver the same to one of the clerks in court of his Majesty's Court of King's Bench, in the public office, and make oath that he received the same from the hands of one or more of the judges of such court in India, &c.; and such depositions, being duly taken and returned, according to the true intent and meaning of this act, shall be allowed and read, and shall be deemed as good and

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competent evidence as if such witness had been present, and sworn and examined vivâ voce at any trial for such crimes or misdemeanors, as aforesaid, in his Majesty's said Court of King's Bench, any law or usage to the contrary notwithstanding; and all parties concerned shall be entitled to take copies of such depositions at their own costs and charges." And by a subsequent section (*m*), "when any person whatsoever shall commence and prosecute any action or suit, in law or equity, for which cause hath arisen, or shall hereafter arise in India, against any other person whatever, in any of his Majesty's courts at Westminster, it shall and may be lawful for such court respectively, upon motion there to be made, to provide and award such writ or writs in the nature of a mandamus or commission, as aforesaid, to the chief justice and judges of the said supreme court of judicature for the time being, or the judges of the Mayor's Court at Madras, Bombay or Bencoolen, as the case may require, for the examination of witnesses, as aforesaid; and such examination, being duly returned, shall be allowed and read, and shall be deemed good and competent evidence, at any trial or hearing between the parties in such cause or action, in the same manner, in all respects, as if the several directions hereinbefore prescribed and enacted in that behalf were again repeated." Another section (*n*) contains a proviso, that "no such depositions, taken and returned as aforesaid by virtue of this act, shall be allowed or permitted to be given in evidence in any capital cases, other than such as shall be proceeded against in Parliament."

§ 102. This statute, it is obvious, went but a short way towards remedying the evil: and several others with similar provisions; as, for instance, the 42 Geo. 3,

(*m*) Sect. 44. (*n*) Sect. 45.

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c. 85, and 1 Geo. 4, c. 101; were passed from time to time to meet the exigencies of certain classes of cases. Nothing effectual was done, however, until the 1 Will. 4, c. 22, entitled "An Act to enable Courts of Law to order the Examination of Witnesses upon Interrogatories and otherwise." The first section enacts, that all and every the powers, authorities, provisions and matters contained in the 13 Geo. 3, c. 63, relating to the examination of witnesses in India, shall be extended to all colonies, islands, plantations and places under the dominion of his Majesty in foreign parts, and to the judges of the several courts therein, and to all actions depending in any of his Majesty's courts of law at Westminster, in what place or country soever the cause of action may have arisen, and whether the same may have arisen within the jurisdiction of the court to the judges whereof the writ or commission may be directed, or elsewhere, when it shall appear that the examination of witnesses under a writ or commission issued in pursuance of the authority thereby given, will be necessary or conducive to the due administration of justice in the matter wherein such writ shall be applied for.

§ 103. The 1 Will. 4, c. 22, contains, however, other provisions more important and extensive than this. It empowers (*o*) each of the courts at Westminster, and also the Court of Common Pleas of the county palatine of Lancaster, and the Court of Pleas of the county palatine of Durham, and the several judges thereof, in every action depending in such court, upon the application of any of the parties to such suit, to order the examination on oath, upon interrogatories or otherwise, before the master or prothonotary of the said court, or other person or persons to be named in such order, of

(*o*) Sect. 4.

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any witnesses within the jurisdiction of the court where the action shall be depending, or to order a commission to issue for the examination of witnesses on oath at any place or places out of such jurisdiction, by interrogatories or otherwise, and by the same or any subsequent order or orders to give all such directions touching the time, place, and manner of such examination, as well within the jurisdiction of the court wherein the action shall be depending as without, and all other matters and circumstances connected with such examinations, as may appear reasonable and just. Also (*p*), that "when any rule or order shall be made for the examination of witnesses within the jurisdiction of the court wherein the action shall be depending, by authority of this act, it shall be lawful for the court, or any judge thereof, in and by the first rule or order to be made in the matter, or any subsequent rule or order, to command the attendance of any person to be named in such rule or order for the purpose of being examined, or the production of any writings or other documents to be mentioned in such rule or order, and to direct the attendance of any such person to be at his own place of abode, or elsewhere, if necessary or convenient so to do; and the wilful disobedience of any such rule or order shall be deemed a contempt of court, and proceedings may be thereupon had by attachment, &c.: provided that no person shall be compelled to produce, under any such rule or order, any writing or other document that he would not be compellable to produce at a trial of the cause." The examination is directed to be on oath, or affirmation in cases where the law allows an affirmation: and persons giving false evidence are to be deemed guilty of perjury (*q*). But lest the power of examining witnesses in this way should be perverted to super-

(*p*) Sect. 5. (*q*) Sect. 7.

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seding the salutary practice of the common law, it is enacted (*r*), that "no examination or deposition to be taken by virtue of this act shall be read in evidence at any trial without the consent of the party against whom the same may be offered, unless it shall appear to the satisfaction of the judge that the examinant or deponent is beyond the jurisdiction of the court, or dead, or unable from permanent sickness or other permanent infirmity to attend the trial."

§ 104. Still further improvements in this respect have been effected by the 6 & 7 Vict. c. 82, which provides means for compelling the attendance of persons to be examined under commissions for the examination of witnesses, &c., to be executed in parts of the realm subject to different laws from those in which the commissions are issued; and the 22 Vict. c. 20, which provides for taking evidence in suits and proceedings before tribunals in the Queen's dominions in places out of the jurisdiction of those tribunals. And by the 22 & 23 Vict. c. 21, s. 16, the above provisions of the 13 Geo. 3, c. 63, and the 1 Will. 4, c. 22, are extended to all suits and proceedings on the Revenue side of the Court of Exchequer.

§ 105. The old statutes 1 & 2 P. & M. c. 13, s. 4, and 2 & 3 P. & M. c. 10, s. 2, enacted, that justices of the peace before whom persons were brought, charged with felony, should, before committing to prison or admitting to bail, take the examination of the prisoner, and information of those that brought him, of the fact and circumstances thereof; and the same, or so much thereof as should be material to prove the felony, should put in writing, &c.; which statutes were repealed, re-enacted,

(*r*) Sect. 10.

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and their provisions extended to cases of misdemeanor, by 7 Geo. 4, c. 64, ss. 2, 3. This latter enactment has in its turn been repealed and amended by 11 & 12 Vict. c. 42, which enacts (*s*) that where witnesses are examined on oath or affirmation against a person charged before a justice of the peace with any indictable offence, and their evidence has been put into writing, and their depositions read over to and signed respectively by them and the justice taking the same, "If upon the trial of the person so accused it shall be proved, by the oath or affirmation of any credible witness, that any person whose deposition shall have been so taken as aforesaid is dead, or so ill as not to be able to travel, and if also it be proved that such deposition was taken in the presence of the person so accused, and that he or his counsel or attorney had a full opportunity of cross-examining the witness, then, if such deposition purport to be signed by the justice by or before whom the same purports to have been taken, it shall be lawful to read such deposition as evidence in such prosecution, without further proof thereof, unless it shall be proved that such deposition was not in fact signed by the justice purporting to sign the same." The 1 & 2 P. & M. c. 13, s. 5, and 7 Geo. 4, c. 64, s. 4, give somewhat similar directions to coroners holding inquisitions of murder or manslaughter; and the Merchant Shipping Act, 17 & 18 Vict. c. 104, s. 270, has some provisions of a like nature for offences under that act.

Salutary effect of the publicity of judicial proceedings on the tribunal and spectators.

§ 106. Nor is it exclusively on witnesses that this institution of publicity exercises a salutary control. Its effect on the judge is no less conspicuous. "Upon his moral faculties," observes Bentham (*t*), "it acts as a check, restraining him from active partiality and improbity in every shape: upon his intellectual faculties

(*s*) Sect. 17. (*t*) 1 Jud. Ev. 523—5.

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it acts as a spur, urging him to that habit of unremitting exertion, without which his attention can never be kept up to the pitch of his duty. Without any addition to the mass of delay, vexation, and expense, it keeps the judge himself, while trying, under trial. Under the auspices of publicity, the original cause in the court of law, and the appeal to the court of public opinion, are going on at the same time. So many by-standers as an unrighteous judge (or rather a judge who would otherwise have been unrighteous) beholds attending in his court, so many witnesses he sees of his unrighteousness; so many ready executioners, so many industrious proclaimers, of his sentence. On the other hand; suppose the proceedings to be completely secret, and the court, on the occasion, to consist of no more than a single judge,—that judge will be at once indolent and arbitrary: how corrupt soever his inclination may be, it will find no check, at any rate no tolerably efficient check, to oppose it. * * * Publicity is farther useful, as a security for the reputation of the judge (if blameless) against the imputation of having misconceived, or, as if on pretence of misconception, falsified, the evidence. Withhold this safeguard, the reputation of the judge remains a perpetual prey to calumny, without the possibility of defence. * * * Another advantage (collateral indeed to the present object, yet too extensively important to be passed over without notice) is, that, by publicity, the temple of justice adds to its other functions that of a school: a school of the highest order, where the most important branches of morality are enforced by the most impressive means: a theatre, in which the sports of the imagination give place to the more interesting exhibitions of real life. Sent thither by the self-regarding motive of curiosity, men imbibe, without intending it, and without being aware of it, a disposition to be influenced, more or less, by the social and tutelary motive, the love of justice."

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§ 107. There are few things, however excellent in themselves, the value of which may not be overrated; and certainly the publicity of legal proceedings is not one of them. Not only are there certain cases for which privacy either total or partial is advisable, but Bentham overrates the principle of publicity when he proposes to entrust the decision of all questions, both of law and fact, to a judge; relying on the publicity of the proceedings, accompanied by ample recordation or notation of the evidence, and appeal to a superior tribunal, as sufficient checks upon his conduct. Following up this view he condemns juries in his Treatise on Judicial Evidence (*u*); though in other parts of the same work he bears unconscious testimony to their value (*v*); and in his Principles of Judicial Procedure (*x*) he admits that they ought not to be abolished in cases where the liberty of the subject is involved. There is not the slightest pretence for saying that any *one* of these three checks would, *standing by itself*, attain the desired object. First, with respect to recordation or notation of the evidence, in other words, the security afforded by *writing*. If the evidence is to be taken down verbatim it would add enormously to the expense of trials; if only minutes of it are to be made, the whole case does not come before the appellate tribunal; and in either case the sources of mischief which are to be found in the ignorance, the laziness, the complaisance, and even the corruption of the notary, scribe, greffier, or whatever else he may be called, are not to be overlooked. Secondly, as to *appeal*,—appeal to a superior tribunal on mere facts, or combinations of law and fact, is, when considered in se, of all checks on misdecision the most illusory, and of all encouragements to vexatious litigation the greatest. Through the mass of allegation, argument and evidence, it is sometimes almost im-

(*u*) 2 Jud. Ev. 285, 286; 4 *Id.* 11, 333, 334; 5 *Id.* 531.

(*v*) See 1 *Id.* 351; 4 *Id.* 585.

(*x*) Chap. 23, § 1.

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possible to ascertain on what ground the decision of the court below proceeded—a disbelief of the witnesses, a misunderstanding of their testimony, or an erroneous view of the law;—and the judge whose decision is appealed from, may fairly ask that the superior tribunal shall have before it *all* the materials on which his decision was founded. But this is from the nature of things impossible: who is to report the *demeanour* of the witnesses when giving their testimony? and the evidence itself may be so voluminous as in the case of a poor litigant to amount to a prohibition of appeal (*y*). Moreover, when the decision of the superior tribunal reversing that of the inferior is obtained, it carries little or no moral weight with it; for it is only the opinion of judge A. against that of judge B., on some question of law, or the credit due to witnesses, or the inferences to be drawn from certain facts; in which, after all, judge B., whose decision is reversed, may be right. Of this even Bentham himself was so conscious, that he admits that, without *publicity*, recordation, appeal, and all other institutions in the character of checks, would be found rather to operate as cloaks (*z*). But publicity, standing by itself, would be equally inefficient. The trials of Naboth, Socrates, Milo, Throckmorton, Sydney, Baxter, &c., were as *public* as could be; i. e. so far as publicity consists in the doors of the court being open

(*y*) We find the following stated as the practice of our own ecclesiastical courts, at least as they existed until recently, in which, by the way, all Bentham's three checks were united. "The party appealing is called upon to *print* the allegations and answers on both sides, the expense of which, including the evidence and exhibits, he must sustain in the first instance. And the opponent proctor has the right to call on the appellant to print the whole, or so much or such parts, of the evidence and exhibits in the case as he thinks fit. This may, in many instances, amount to a denial of appeal. In one particular case the party did intend to appeal, but, finding that the printing alone would cost very nearly 1,000*l*., he abandoned the idea of appealing." 3 Jur. 140.

(*z*) 1 Jud. Ev. 524.

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to all persons who please to go into them; and as the number of persons that do this must necessarily be very limited, the publicity here spoken of by Bentham probably means publicity through the agency of the press. The liberty of the press would not, however, last long if the power of determining both the law and the facts in all causes, both civil and criminal—of passing sentence in case of conviction in the former, and assessing the damages for the successful plaintiff in the latter—were vested in judges who are the nominees of the executive, and liable as men to prejudices of class and station, political and personal. Let it also be remembered that the liberty of the press in this country dates only from the latter end of the seventeenth century; that trial by judge and jury protected the other liberties of the country, long before liberty of the press had any existence, and since that period has protected both it and them; and that we find Bentham's three checks combined in the practice of the civil tribunals of modern France, the superiority of which over all others has not, at least as yet, been demonstrated.

We trust we have shewn that without the assistance of a casual tribunal, through which alone the cleansing tide of fresh thought is poured into judicial proceedings, they never could be kept pure and healthy; and that no effectual checks ever have been, or ever can be, devised against the obvious and great dangers of entrusting the decision of facts to a fixed one, however elaborately constituted. Among many other testimonies to the wisdom of our ancestors in the constitution of their ordinary judicial tribunal, are to be found the recent introduction of the mode of taking evidence vivâ voce into the Court of Chancery (*a*), the Court of Admiralty (*b*), and the ecclesiastical courts (*c*), and on the hearing of motions

(*a*) 15 & 16 Vict. c. 86, ss. 28 *et seq.*

(*b*) 3 & 4 Vict. c. 65, ss. 7 *et seq.*

(*c*) 17 & 18 Vict. c. 47; 20 & 21 Vict. cc. 77 and 85.

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and summonses in the courts of common law (*d*); the establishment of the jury in the two first (*e*), and in the new court to which the principal part of the business of the ecclesiastical courts has latterly been transferred (*f*); and that on the continent of Europe, where the practice of the civil and canon laws has prevailed for centuries, we everywhere find the inhabitants loudly demanding, as reforms essential to a sound administration of justice, "The trial by jury," and "Publicity of judicial proceedings."

(*d*) 17 & 18 Vict. c. 125, ss. 46 *et seq.*

(*e*) 21 & 22 Vict. c. 27, s. 3; 3 & 4 Vict. c. 65, s. 11.

(*f*) 20 & 21 Vict. cc. 77 and 85.

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PART II.

HISTORY OF THE RISE AND PROGRESS OF THE ENGLISH LAW OF EVIDENCE: WITH ITS ACTUAL STATE AND PROSPECTS.

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§ 108. It is proposed in the present Part to trace the rise and progress of the law of evidence in this country; Object of this Part.

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concluding with some observations on its actual state and prospects.

Inconsistent dicta as to the antiquity of the judicial evidence of this country.

§ 109. On the first of these subjects little is to be found in our modern works, beyond a few dicta, not very consistent with each other. In the case of *R.* v. *The Inhabitants of Eriswell* (*a*), decided in Trinity Term, 1790, Lord Kenyon, C. J., is reported to have said, "the rules of evidence have been matured by the wisdom of ages, and are now revered from their antiquity and the good sense in which they are founded;" and in *Bauerman* v. *Radenius* (*b*), about eight years later, he informs us that at the beginning of the eighteenth century, Lord Macclesfield said that the most effectual way of removing landmarks would be by innovating on the rules of evidence; and so he said himself. This, however, is not the general opinion of the present day, in which our system of judicial evidence is commonly spoken of as something altogether modern: and in the case of *Lowe* v. *Jolliffe* (*c*), decided not quite thirty years previous to that first quoted, Lord Mansfield, C. J., is reported to have declared on a trial at bar, that the court "did not then sit there to take its rules of evidence from Siderfin and Keble;" whose reports begin about a century before the time when he was speaking. In the proceedings against Queen Caroline, in the year 1820 (*d*), Abbott, C. J., in delivering the answer of the judges to a question put by the House of Lords, said, "in their judgment it is a rule of evidence as old as any part of the common law of England, that the contents of a written instrument, if it be in existence, are to be proved by the instrument itself, and not by parol evidence." On the other hand, in the work on evidence by Messrs. Phillipps and

(*a*) 3 T. R. 707, 721.
(*b*) 7 T. R. 663, 667.
(*c*) 1 W. Blackst. 366.
(*d*) 2 B. & B. 289; see *infrà*, bk. 3, pt. 2, ch. 3.

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Amos (*e*), published in 1838, it is said that the law of evidence, according to which the determinations of the courts are at present governed, has been almost entirely created since the time of the reporters Lord Raymond, Salkeld, and Strange; i. e. since a period beginning shortly after the revolution of 1688, and ending at a tolerably advanced point in the reign of Geo. II. Also, in the 10th ed. of Phillipps on Evidence, published in 1852 (*f*), it is stated that the important rule rejecting hearsay or secondhand evidence is not of great antiquity, and that one of the earliest cases in which it was acted upon is *Samson* v. *Yardly*, P. 19 Car. II., 2 Keb. 223.

Difference between the ancient and modern systems.

§ 110. The truth seems to be, that while "The Law of Evidence" is the creation of comparatively modern times, most of the leading principles on which it is founded have been known and admitted from the earliest; and in order to shew the nature of the ancient, as well as the advantages of the modern system, it will be necessary to examine those principles.

Rules of evidence are either primary or secondary.

Primary rules of evidence.

Only three.

§ 111. All rules respecting judicial evidence may be divided into *primary* and *secondary;* the former relating to the *quid probandum,* or thing to be proved, the latter to the *modus probandi,* or mode of proving it. Of the former there are but three: 1st. That the evidence adduced must be directed solely to the matters in dispute; 2nd. That the burden of proof lies on the party who would be defeated supposing evidence were not given on either side; and 3rd. That it is sufficient for a party on whom the burden of proof lies to prove the substance of the issue raised. These rules are so obviously reasonable and necessary for the administration of justice, that it would be difficult to find a system in which they have not at least a theoretical existence, however their effect may occasionally have been extended or narrowed by

Universal recognition of them.

(*e*) Page 335. (*f*) Vol. 1, p. 165.

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Secondary rules of evidence.

Much more numerous.

Some almost as universal as the primary.

artificial and technical reasoning; and accordingly they have always been recognized in our own (*g*). The secondary rules are necessarily more numerous, but there are some almost as obvious and universal as the primary. Probably no code of laws ever existed which was destitute of its estoppels, presumptions, and oaths or other sanctions of truth, or which neglected to establish the great principle, so essential to the peace of society, that matters and claims which have been once regularly and judicially decided, must be considered as settled and not again be brought into dispute. Of all these likewise we find ample mention in our early books (*h*); especially

(*g*) That the proof should be confined to the issues raised, and consequently that the admissibility of evidence depends on the state of the pleadings, see Finch, Comm. Laws, 61; the cases from the Year Books collected in 2 Rol. Abr. 676, 677, pl. 8, 10, 11, 13, 14, 24, 28, &c.; and those put by Bradshawe, A. G. arguendo, in *Reniger* v. *Fogassa*, Plowd. 7. Again, that the burden of proof lies in general on the party who asserts the affirmative, has been a recognized maxim of law from the earliest periods, see Bract. lib. 4, c. 7, fol. 301 B.; F. N. B. 106, H.; Co. Litt. 6 b; 2 Inst. 662; 4 Inst. 279; 3 Leon. 162, pl. 211; Gouldsb. 23, pl. 2; *Anon.*, Littl. R. 36; and the maxim "actori incumbit onus probandi," seems also to have been well known in former times; 4 Co. 71 b; Hob. 103. A case of the burden of proof shifting is given by Glanville, lib. 10, c. 12. Also, that it is sufficient to prove the substance of the issue, see Litt. ss. 483, 484, 485; 6 Edw. III. 41 b, pl. 22; 8 Edw. III. 70 a, pl. 37; Hob. 73, 81; Tryals per Pais, 140, Ed. 1665; Co. Litt. 227 a; 281 b, 282 a, &c.

(*h*) See Glanv. lib. 12, c. 24, who wrote in the reign of Hen. II.; *Odo de Compton's case*, Memor. in Scac. 29 Edw. I.; 6 Edw. III. 45 a, pl. 31; and the title "Estoppel" in the indexes to our old books, beginning with the Year Book of Edw. II. As instances of presumptions, or intendments, of law noticed by ancient authorities, see Fleta, lib. 6, c. 34, §§ 4 & 5; Bract. lib. 1, c. 9, § 4; Litt. ss. 99 & 103; Co. Litt. 42 a and b, 67 b, 78 b, 99 a, 232 b, 373 a and b; 5 Co. 98 b; 6 Co. 76 a; 10 Co. 56 a; 12 Co. 4 and 5; Cro. Eliz. 292, pl. 2; Cro. Jac. 252, pl. 6, and 451, pl. 29; Cro. Car. 317, pl. 14, and 550, pl. 2. It is well known that during the middle ages oaths were in constant use, or rather abuse, throughout Christendom; including this country, which always insisted on an oath as a tes of truth, and had its judicial purgation under the name of wager of law. And with respect to the authority of res judicata: by the old statute, 4 Hen. 4, c. 23, it is

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the first, the doctrine of which, as observed by a late able writer, was once tortured into a variety of absurd refinements (*i*).

Others much less.

§ 112. Many of the other secondary rules of evidence are based on principles which, though quite as consonant to reason, and as much required for a perfect administration of justice, are not so obvious at first sight; and which, owing to the hardship of their enforcement in particular cases, and the great discretion required in their application, are sometimes apt to be disregarded. Among these may be reckoned the just principle, "res inter alios acta alteri nocere non debet,"—that persons are not to be affected by the acts or words of others, to which they were neither party nor privy, and consequently had no power to prevent or control. We find this appealed to as a recognized maxim of law so early as the reign of Edward II. (*k*). Under this head comes

Principles on which these are founded were well known to our ancestors.

ordained and established, that "after judgment given in the courts of our lord the king, the parties and their heirs shall be thereof in peace, until the judgment be annulled (anientiz) by attaint or by error, if there be error, as hath been used by the law in the times of the progenitors of our said lord the king." See also the stat. West. 2 (13 Edw. 1, stat. 1), c. 5, s. 2.

(*i*) 2 Smith's Lead. Cases, 607, 4th Ed.

(*k*) M. 3 Edw. II. 53, tit. Entre; A writ of entry ad terminum qui præteriit was brought, in which the demandant alleged that the tenant had right of entry only through A., his father, who leased to him the term, &c.; to which the tenant pleaded that the plaintiff was bastard, and could not claim as heir to A.; to which the demandant replied that he had formerly sued a writ against one C., who pleaded the bastardy of the demandant, who thereupon sued out a writ to the Bishop of L—, who certified to the court that he was mulier, &c. To this the tenant rejoined that he was no party to that proceeding, and *res inter alios acta aliis &c.* To this it was answered that that maxim did not apply to such a case. The judges took time to consider until the next term, and then gave judgment, that as that court had been certified of the demandant's state of mulier by a certification, which was completed by a judgment given under that certification; and as he who is once mulier is mulier for ever, no matter between whom it be; they gave judgment that he

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the great principle, the strict enforcement of which (as has been already stated (*l*)) forms a distinguishing feature of the English law of evidence; namely, the rejection of all transmitted or derivative evidence—of all proof offered second-hand, or *obstetricante manu*. We have seen the observations of Lord C. J. Abbott as to that branch of this rule which relates to written instruments (*m*); and with respect to hearsay or second-hand evidence in general, our ancient lawyers seem to have had a thorough perception of its infirmity (*n*). Thus,

was entitled to seisin, &c. See on this subject, Co. Litt. 352 b; 2 Smith's Lead. Cas. 614, 4th Ed. The above case was decided exactly 350 years before the first case in Siderfin, while the reports of Keble begin a year later,—the two reporters whose authority on the subject of evidence Lord Mansfield, 1 W. Bl. 366, wished to consign to oblivion, on account of their *antiquity*. See also 2 Inst. 513. The rule "res inter alios &c." was well known at Rome. See Cod. lib. 7, tit. 60, ll. 1 and 2, in the latter of which it is spoken of as being "notissimi juris." *Infra*, bk. 3, pt. 2, ch. 5.

(*l*) Introd. § 29, and *supra*, pt. 1, § 89. See *infra*, bk. 3, pt. 2, ch. 3 and 4.

(*m*) *Supra*, § 109. See Fleta, lib. 6, ch. 34, § 1, and 6 Mod. 248. This principle was also known to the Romans. Dig. lib. 22, tit. 4, l. 2; lib. 26, tit. 7, l. 57; Cod. lib. 4, tit. 21, ll. 5, 7, and 11; Domat, Lois Civiles, part. 1, Liv. 3, tit. 6, sect. 2, §§ x. and xi.

(*n*) It could hardly have been otherwise, as the infirmity of this kind of proof seems to have been observed in almost every age and country. According to the Athenian law hearsay evidence, or ἀκοὴν μαρτυρεῖν, was allowed in cases where the supposed speaker was dead, and in some other instances; Law Mag. (N. S.) No. 1, p. 36. Hearsay appears to have been received in ancient Rome, Quint. lib. 5, cap. 7, at least as proof of old transactions, Dig. lib. 22, tit. 3, l. 28, and lib. 39, tit. 3, l. 2, § 8, although rumour and common report were estimated at their worth. "Vanæ voces populi non sunt audiendæ: nec enim vocibus eorum credi oportet, quando aut noxium crimine absolvi, aut innocentem condemnari desiderat:" Cod. lib. 9, tit. 47, l. 12. And on the value of hearsay when admitted, Quintilian *in loc. cit.* says, "Gentium simul universarum elevata testimonia ab oratoribus scimus, et tota genera testimoniorum: ut *de auditionibus;* non enim ipsos esse testes, sed injuratorum afferre voces." Instead of *injuratorum* some copies have *injuriatorum*, which wholly alters the sense of the passage, but the other reading is adopted by an immense majority of the commentators. The civilians and canonists admitted hear-

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Sir Edward Coke, in the early part of the seventeenth century, lays down as a rule of law, "Plus valet unus

say in proof of ancient rights and in some other cases, but in general looked on it with suspicion: Huberus, Præl. Jur. Civ. lib. 22, tit. 5, n. 20; Mascardus de Prob. Concl. 151, 104; Struvius, Syntag. Jur. Civ. ed. Mülleri, Exerc. 28, tit. 45, note (*u*), ix. *et seq.* It is rejected in general by the Scotch law: Burnett's Crim. Law Scotl. 600; 1 Dicks. Law Ev. in Scotl. 57 *et seq.*; and, it is said, also by the Mohammedan law, Macnagh. Mo. Law, 259. Under the old French law, Pothier expressly laid down, "Above all it is requisite that the witness who says he has a knowledge of any fact, should shew how he has such knowledge. For instance, if I would prove that you had sold me such a thing, it would not be sufficient for the witness to say in vague terms, that he knew you had sold me that thing; he should state how he had that knowledge; for instance, that he was present at the agreement; or that he had heard you say you had made such a sale; if he said that he knew it from a third person, his deposition would not be any proof." 1 Ev. Poth. § 786. Loysel, a very ancient French authority, significantly observes, "Un seul œil a plus de crédit que deux oreilles n'ont *d'audivi*:" and again, "Ouïr dire va par ville, et en un muid de cuider n'y a point plein poing de savoir." In commenting on this, Bonnier, in his Traité des Preuves, § 205, observes, that a multitude of remarks of a similar nature have been made (by French lawyers, as it seems), but they are, after all, nothing more than cautions (*indications*), not positive precepts. And in another place he thus states the modern practice in France: "It is evident that proof weakens in proportion to its distance from its source. * * * We therefore ought never to have recourse to proofs of the second degree when those of the first degree may be employed. * * * It is only when the direct witnesses are dead, or incapable of deposing, that witnesses of the second degree are allowed to be called to reproduce the declaration of the first. Still, the very fact that it is no longer possible to hear the first, should induce the judge to examine carefully if there be any symptoms of fraud; for it is obvious that he who desires to injure without exposing himself to detection, will not fail to put a false statement in the mouth of some one from whom he cannot fear contradiction. A witness must be therefore doubly credible in order to have reliance placed on his deposition when it only amounts to a hearsay; *à fortiori* proof is extremely weak when we are obliged to follow out a line (*parcourir une filière*) more or less complicated, before we can arrive at the direct testimony. And yet in the celebrated prosecution of the Calases, the strongest piece of circumstantial evidence came under the cognizance of the judge, only through the medium of four wit-

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oculatus testis, quam auriti decem," "Testis de visu præponderat aliis" (*o*). So the judges having held, in the case of one William Thomas, that the statutes 1 Edw. 6, c. 12, s. 22, and 5 & 6 Edw. 6, c. 11, s. 12, which require that no person be proceeded against

nesses, who had, as it was said, successively transmitted it from one to the other; and the first of those witnesses, the one who was supposed to have heard the threat uttered by the father to his son, was not even named, being an *unknown girl* whom it was impossible to find. While branding with just indignation proceedings where capital convictions were pronounced on such evidence, it must be acknowledged that public opinion alone can prevent a repetition of them. In this matter, as in everything else which concerns the appreciation of testimony, it is impossible to lay down fixed rules beforehand; for how can we determine *à priori* the precise point where truth begins and error ends?" *Id.* §§ 728, 729. These observations, while they shew the defects of the French judicial system, place in a strong light the excellence of our own. Such a case as that here referred to by Bonnier could hardly occur in England at the present day; for our rules which regulate the admissibility of evidence being rules of *law*, no judge ought to receive such proof; and were he to violate his duty, if not his oath, by so doing, still it would be for the jury, and not for him, to decide on its *value*, and pronounce the verdict of acquittal or condemnation. Nor did the principle in question escape the notice even of the rude legislators of the middle ages. Notwithstanding the widely-spread superstition which stamps with unquestionable veracity the statements of criminals at the place of execution, we find the following enactment in the Venedotian Code, or ancient code of North Wales, bk. 2, c. 4, § 11: "A thief at the gallows, respecting his fellow thieves: If he should assert that another person was an accessory with him in the robbery for which he is about to suffer; and he should persist in his assertion unto the state God went to and he is going to; his word is there decisive, and cannot be gainsaid: nevertheless his fellow-thief shall not be executed, but is a saleable thief; for no person is to be executed on the word of another, if nothing be found on his person." The Dimetian Code, or ancient code of West Wales, contains a similar provision: bk. 2, c. 5, § 9. See for these Codes the "Ancient Laws and Institutes of Wales, &c.," printed under the direction of the Commissioners on the Public Records, 1841. It seems that the Hindu Code forms an exception; and that in that country the *secondary* witness, i.e. the person who has been made acquainted with facts by hearsay, is as receivable as any other. Translation of Pootee, c. 3, s. 7, in Halhed's Code of Gentoo Laws.

(*o*) 4 Inst. 279.

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for treason except on the oath of two lawful accusers, were satisfied by the evidence of one person who spoke of his own knowledge, and that of another who had the information from a third, and he from a fourth, to whom the first had related it (*p*). The same authority pronounces it "a strange conceit that one may be an accuser by hearsay;" and says that the doctrine was utterly denied by the judges in Lord Lumley's case (*q*), H. 14 Eliz., a report of which he had seen in the handwriting of C. J. Dyer (*r*); and Thomas's case is also mentioned by Sir Matthew Hale as overruled (*s*). As our legal history advances the authorities become more distinct on this subject, and the inconclusiveness of hearsay or second-hand evidence seems to have been universally recognized during the latter half, at least, of the seventeenth century (*t*). Instances are to be seen in the state prosecutions of that period (*u*); and we sometimes find the objection taken even by persons not in the legal profession. Thus Archbishop Laud, in his defence, observes of some evidence offered against him, that it is "hearsay" (*x*); and Lord William Russell, complaining on his trial that he thought he had very hard measure, that there was brought against him a great deal of evidence by hearsay (*y*), the court at once admitted the objection, but evaded its force in a way that will be shewn presently; and in Mich. T. 19 Jac. I.

(*p*) *Thomas's case*, Dyer, 99 b, pl. 68, P. 1 Mar.

(*q*) 3 Inst. 25.

(*r*) *Id.* 24.

(*s*) 1 H. P. C. 306; 2 *Id.* 287. These authorities probably did not mean that the evidence of the second witness was to be rejected as coming second-hand; but that, being traceable up to the first witness, it was a mere repetition of his testimony, and consequently could not be considered as the evidence of a second *accuser* within the meaning of the statute. See Hale, *in loc. cit.*, and 2 Hawk. P. C. c. 25, s. 141.

(*t*) *Samson* v. *Yardly*, 2 Keb. 223, (5) P. 19 Car. II.; *Lutterell* v. *Reynell*, 1 Mod. 282, and the authorities in the next three notes.

(*u*) 9 Ho. St. Tr. 608, 848, 1094; 12 *Id.* 1454.

(*x*) 4 Ho. St. Tr. 431.

(*y*) 9 Ho. St. Tr. 608.

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the principle that the opinions of witnesses are not a legitimate ground for legal decision, was recognized in the Star Chamber (*z*).

§ 113. Many other instances might be adduced to shew the recognition by our ancestors, of principles of evidence which we are in the habit of looking on as altogether modern. Even the rules of our forensic practice respecting proof were known to them: as, that at trials the party on whom the burden of proof lies ought to begin (*a*), that leading interrogatories ought not to be put (*b*), &c.

In former times the principles of evidence were not embodied in binding rules.

§ 114. But although the germs of our law of evidence are thus traceable in the proceedings of our ancestors, they do not appear to have reduced its principles into a system, or invested them with the obligatory force essential to the steady and impartial administration of justice. Except in the case of præsumptiones juris which, being part of the law itself, it would have been manifestly improper to disregard, and a few other instances, the principles of evidence were looked on as something merely directory, which judges and jurymen might follow or not at their discretion. The best illustration of this will be found in the practice relative to hearsay or second-hand evidence. We have seen that our ancient lawyers were perfectly aware of its weakness, but they did not think themselves called on to reject it absolutely. Thus in *Rolfe* v. *Hampden*, T. 34 Hen. VIII. (*c*), in order to support a will of land, contained in an ancient paper writing (before the Statute of Frauds), the testimony of three witnesses was received, one of whom spoke of his own knowledge, the rest on the report of

(*z*) *Adams* v. *Canon*, reported in the margin of the edition of Dyer's Reports, 1688, 53 b, pl. 11.

(*a*) *Anon.*, Litt. R. 36; *Heidon* v. *Ibgrave*, 3 Leon. 162, pl. 211; Gouldsb. 23, pl. 2.

(*b*) 4 Inst. 279.

(*c*) Dyer, 53 b, pl. 11.

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others; and L. C. J. Dyer, by whom the case is reported, saw nothing extraordinary in this, but observes, "the jury paid little regard to the aforesaid testimony." And at a later period the courts seem to have thought that, although hearsay was not evidence in itself, it might be used to introduce, explain, or corroborate more regular proof (*d*).

§ 115. Instances are, however, to be found in the State Trials, previous to the revolution of 1688, of decisions going much beyond this, and the key to which lies in a circumstance commonly overlooked. So long as the judges believed that it was discretionary with them to enforce or disregard the received principles of evidence, it is natural to suppose that with the high prerogative notions of those times, and dependant as they were on the crown, they would exercise that discretion in favour of the crown, and carefully avoid laying down any general rules which might fetter the executive in proceeding against state criminals. Accordingly we find that in the sixteenth and early part of the seventeenth centuries, it was an open and avowed principle that the rules of evidence and practice on prosecutions for high treason, and perhaps for felony also, were different from those followed in ordinary cases (*e*). Thus, although by the established usage of the common law from the earliest times, witnesses were sworn, examined, and cross-examined in open court, the judges refused to compel their personal appearance in cases of treason (*f*), holding that it would be opening a gap for the destruction of the king (*g*), &c. The consequence of establish-

(*d*) 2 Hawk. P. C. c. 46, s. 14, Ed. 1716; Bac. Abr. Evid. K., Ed. 1736; Trials per Pais, 389, 390; 1 Mod. 283.

(*e*) See 2 Hawk. P. C. c. 46, s. 9, and the authorities in the following notes.

(*f*) Staundf. P. C. 164.

(*g*) *Sir Walter Raleigh's case*, 2 Ho. St. Tr. 19. Hallam, in his Constitutional History of England, vol. 2, p. 148, 2nd Ed., speaking of the trial of the Earl of Strafford, says, that "in that age the rules

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ing this distinction was, that on charges of that nature not only was the loosest and most dangerous evidence received, but the entire proceedings were conducted in a way which set at defiance every principle of fairness and justice. "Throughout the state trials before the time of the Commonwealth," observes Mr. Phillipps(*h*), "the worst species of hearsay was constantly received; such as the examinations of persons who might have been produced as witnesses, or who had been convicted of capital offences, or who had signed confessions in the presence only of the officers of government, and under the torture of the rack." Thus, in the case of Sir Nicholas Throckmorton (*i*), the principal evidence was the deposition of a person already convicted of treason, and whose execution had been respited from time to time in order to induce him to accuse the prisoner (*k*). And among many flagrant misinterpretations of the law in favour of the crown and against the prisoner, of which that trial is full, the court unblushingly declared that the words in the Statute of Treason, 25 Edw. 3, c. 2, stat. 5, that persons accused of treason should "thereof be proveably attainted of open deed, by people of their condition," meant that they should be attainted, not by verdict of a jury, but by the evidence of persons already attainted, who declare the accused participators in their treason, and are thus "people of their condition" (*l*). After the Restoration matters seem to have mended; the witnesses appeared in person, but the practice of admitting proof at second-hand continued,—the judges acknowledging that it was not evidence, and promising to tell the jury so (*m*). Thus, in *Langhorn's*

of evidence, so scrupulously defined since, were either very imperfectly recognized, or continually transgressed."

(*h*) 1 Ph. Ev. 166, 10th Ed.

(*i*) 1 Ho. St. Tr. 869.

(*k*) 1 Ph. Ev. 166, 10th Ed.

(*l*) 1 Ho. St. Tr. 889.

(*m*) See *Langhorn's case*, 7 Ho. St. Tr. 441; *Lord William Russell's case*, 9 *Id.* 608; *Algernon Sidney's case*, *Id.* 848; *Charnock's case*, 12 *Id.* 1414 and 1454.

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case, 31 Car. II. (*n*), Atkins, J., interposed while a witness was giving his testimony, "That is no evidence against the prisoner, because it is by hearsay;" and Scroggs, C. J., added, "It is right, and the jury ought to take notice, that what another man said is no evidence against the prisoner, for nothing will be evidence against him but what is of his own knowledge." Notwithstanding this language, to quote again from Mr. Phillipps (*o*), "On the trials for the Popish Plot, the evidence consisted principally of a narrative of the transactions of the supposed conspirators in various countries, collected during a long period of time from a multitude of letters, the contents of which were given from recollection; the witnesses not having taken a note of any part of the letters at the time of reading, not having read them for a great number of years, nor having been required in reading to notice their contents, and not producing one of the letters, or a copy, or even an extract."

Origin of the modern "Law of Evidence."

§ 116. The system known in practice by the title of the "Law of Evidence" began to form about the middle of the seventeenth century,—at least this is sufficiently accurate for a general view. The characteristic feature which distinguishes it, both from our own ancient system and those of most other nations, is, that its rules of *evidence*, both primary and secondary, are in general rules of *law;* which are not to be enforced or relaxed at the discretion of judges; but are as binding on the court, juries, litigants, and witnesses, as the rest of the common and statute law of the land; and that it is only in the forensic procedure which

Its characteristic feature—rules of *evidence* are rules of *law*.

(*n*) 7 Ho. St. Tr. 441.

(*o*) 1 Ph. Ev. 166, 10th Ed. From the above observations it follows that too much reliance must not be placed on the valuable work called "The State Trials," as presenting a correct picture of the *ordinary* practice of English tribunals before the Revolution. It should not be forgotten that most of the cases there reported were prosecutions for high treason, and took place in times of great excitement.

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regulates the manner and order of offering, accepting, and rejecting evidence, that a discretionary power, and even that a limited one, is vested in the bench. A judge, consequently, has now no more right to receive prohibited evidence, because he thinks that by so doing justice will be advanced in the particular case, than he has to suspend the operation of the Statute of Mortmain, or to refuse to permit an heir-at-law to recover in ejectment, because it appears that he is amply provided for without the land in dispute. It must not, however, be supposed that this great principle became established all at once; and indeed the gradual development of our system of judicial evidence, from the above epoch to the present day, may be studied alike with advantage and pleasure. To point out the various improvements and alterations that have from time to time been effected in it, by the courts and the legislature, would far exceed the limits of a mere sketch of its progress. It will therefore be sufficient to glance at a few particulars; and we shall proceed in the first place with the history, during that period, of the rule rejecting hearsay evidence.

Gradual development of this principle.

History of the rule rejecting hearsay evidence.

§ 117. Although, as already stated, the infirmity of hearsay evidence was generally acknowledged in the reign of Charles II. (*p*); yet Sir Matthew Hale gave it as his opinion, that where a rape was committed on a child of tender years, the court might receive, as evidence, the child's narrative of the transaction to her mother or other relations (*q*). At the beginning of the eighteenth century, Serjeant Hawkins only ventures to lay down the rule thus (*r*), "*it seems* agreed that what a stranger has been heard to say is *in strictness* no manner of evidence either for or against a prisoner;"

(*p*) See *ante*, §§ 112, 115.
(*q*) 1 Hale, P. C. 634, 635.
(*r*) 2 Hawk. P. C. c. 46, s. 14, Ed. 1716.

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and similar language is used in Bacon's Abridgment (*s*). Lord Chief Baron Gilbert, also, in his Treatise on the Law of Evidence, composed about the same time, being it is believed the earliest on the subject, lays down that "a mere hearsay is no evidence" (*t*); "but though hearsay be not allowed as direct evidence, yet it may be in corroboration of a witness's testimony, to shew that he affirmed the same thing before on other occasions, and that the witness is still consistent with himself" (*u*). Still, in 1754, on the trial of Elizabeth Canning for perjury, we find some rather elaborately got up evidence tendered and rejected by the bench, the nature of which seems to shew that the rule against hearsay was not then generally understood by the legal profession (*v*). Towards the end of the eighteenth century, however, the text writers speak of the rule as established (*x*); but while recognized as obligatory, it was not extended to all the cases which fall within its principle. Thus, so late as 1779, on a trial for assault with intent to ravish a very young child, we find Buller, J. (himself the author of a Treatise on Nisi Prius), adopting the course advised by Sir Matthew Hale about a century before, by receiving as evidence the information relative to the transaction which the child, who was not examined as a witness, had given to two other persons. The point having been reserved, this course was condemned by all the judges; and a definite rule relative to the testimony of children laid down for the future (*y*). Notwithstanding which, it is said, that so late as 1808 the same objectionable kind of evidence was received on an indictment for a rape on a child five years old; but on a case reserved, the

(*s*) Bac. Abr. Evid. (K), Ed. 1736.
(*t*) Gilb. Ev. 149, 4th Ed.
(*u*) *Id.* 150.
(*v*) 19 Ho. St. Tr. 342, 343.
(*x*) Bull. N. P. 294; 2 Fonb. Eq. 450.
(*y*) *R.* v. *Brazier*, 1 Leach, C. L. 199.

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judges, as might have been expected, thought it clearly inadmissible (*z*). And an approved treatise of the present day informs us, that so late as the year 1790, the rule against the admission of hearsay evidence does not appear to have been settled with regard to depositions taken before magistrates (whether upon criminal charges or upon other occasions); and several of the exceptions to this rule have been much narrowed within very modern times (*a*). The authors who have written on evidence during the current century, all speak of the rule rejecting hearsay evidence as established and notorious (*b*).

Progress of other parts of the law of evidence during the last and present centuries.

§ 118. Other parts of the law of evidence are marked by similar improvement during the last and present centuries. The enlightened principle, that judicial oaths are not to be rejected on account of the witness holding erroneous notions on religion, provided a mode of swearing be found which he considers binding on his conscience, was fully established by the great case of *Omychund* v. *Barker* in 1745 (*c*). In later times also relief has been given to particular classes of persons, who object on conscientious grounds to the taking oaths in any shape (*d*). So the incompetency of witnesses, on the ground of interest, was extricated from the chaos of conflicting authority in which it lay involved, and placed on at least an intelligible footing, by the case of *Bent* v. *Baker* (*e*) in 1789, and other decisions of that period. In our own time this latter subject has

(*z*) *R.* v. *Tucker*, MS.; cited Ph. & Am. Ev. 6, and 1 Ph. Ev. 10, 10th Ed.

(*a*) 1 Ph. Ev. 165—6, 10th Ed. See *Higham* v. *Ridgway*, 10 East, 109, and the cases there referred to; *R.* v. *Eriswell*, 3 T. R. 707; *R.* v. *Chadderton*, 2 East, 27; *R.* v. *Frystone*, *Id.* 54; *R.* v. *Abergwilly*, *Id.* 63.

(*b*) 2 Ev. Poth. 283, 284: and see any of the modern Treatises.

(*c*) 1 Atk. 21; Willes, 538; 1 Wils. 84.

(*d*) *Infra*, bk. 2, pt. 1, ch. 2.

(*e*) 3 T. R. 27. See Ph. & Am. Ev. 74, 75.

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attracted much attention—the doctrine of the incompetency of witnesses having been attacked in toto as improper and mischievous (*f*), and being now almost annihilated (*g*). By various recent statutes also many species of documents have been invested with the character of public documents, and made evidence against all persons of the facts which they record or attest (*h*); the proof of public documents in general has been rendered more simple and less expensive (*i*); proof of certain things which it may fairly be deemed needless to prove, has been dispensed with (*k*); liberal powers of amending variances at trials have been vested in tribunals (*l*); and more effective means afforded to litigants, of getting at evidence in the custody or under the control of the opposite party (*m*). While these alterations must on the whole be viewed as improvements, it may be a question whether they have not, in some cases, been carried too far. The principle which attaches so much faith to public documents, for instance, rests in a great degree on the rule,—"Omnia præsumuntur ritè esse acta,"—a maxim unquestionably just when restrained within its due limits, but which loses much of its force when the document is only of a *quasi* public nature, i. e. drawn up by individuals acting in some sense indeed on the part of the public, but having a personal interest in the existence of the facts they profess to record or attest; and there is another maxim equally

(*f*) Benth. Jud. Ev. vol. i. 1—15; vol. v. 1—191, &c., &c.; Taylor, Ev. §§ 1210 *et seq.*, 4th Ed. See this subject considered *infra*, bk. 2, pt. 1, ch. 2.

(*g*) *Infra*, bk. 2, pt. 1, ch. 2.

(*h*) 8 & 9 Vict. c. 16; 14 & 15 Vict. c. 99; 17 & 18 Vict. c. 104; 25 & 26 Vict. c. 67; &c.

(*i*) 8 & 9 Vict. c. 113; 14 & 15 Vict. cc. 99 and 100; 17 & 18 Vict. c. 104, ss. 107, 138, 175, N. 3, 249, 277; 18 & 19 Vict. c. 91, s. 15; 20 & 21 Vict. c. 77, s. 91; 31 & 32 Vict. cc. 37 and 54.

(*k*) 8 & 9 Vict. c. 113; 11 & 12 Vict. c. 42, s. 17; 14 & 15 Vict. c. 99; 17 & 18 Vict. c. 104, s. 270; &c.

(*l*) *Infra*, bk. 3, pt. 1, ch. 3.

(*m*) 14 & 15 Vict. c. 99, s. 6; 17 & 18 Vict. c. 125, ss. 50, 51 *et seq.*

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valuable which must not be lost sight of,—"Res inter alios acta alteri nocere non debet." In one instance at least—that relating to entries in the official log-books of merchant ships—the legislature found it necessary to retrace its steps in this respect (*n*); and several cases illustrate the danger of the enactments in the 8 & 9 Vict. c. 16, s. 28 and 25 & 26 Vict. c. 89, s. 37, which, in an action by a railway company for calls, render the register of shareholders *primâ facie* evidence of the defendant being a shareholder, and of the number and amount of his shares (*o*). And, lastly, by "The Common Law Procedure Act, 1854" (*p*), various anomalies have been removed from the forensic procedure affecting our law of evidence, and the system itself brought more into harmony with its own principles. The value of this statute was much impaired, by its operation being confined to the evidence given in civil cases (*q*); but this has been remedied by the 24 & 25 Vict. c. 66, the 28 Vict. c. 18, and the 32 & 33 Vict. c. 68.

Cause of the slow development of the law of evidence in England.

§ 119. The slow development of the law of evidence, compared with the other branches of our jurisprudence, seems a natural consequence of the general principle, that in every nation the substantive rules of law arrive at maturity before the adjective. The reason is obvious.

The substantive rules of

(*n*) See the 13 & 14 Vict. c. 93, ss. 85—93, and the alterations introduced by the amending act, 14 & 15 Vict. c. 96, s. 27. Both these statutes are repealed by the 17 & 18 Vict. c. 120; and by the Merchant Shipping Act, 17 & 18 Vict. c. 104, ss. 244 and 285, the provisions in the 14 & 15 Vict. c. 96, s. 27, as to the admissibility in evidence of the official log-books of merchant vessels, have been re-enacted with still further improvements.

(*o*) *Waterford Railway Company* v. *Pidcock*, 8 Exch. 279; *Nixon* v. *Brownlow*, 3 H. & N. 686. In *Darby* v. *Ouseley*, 2 Jurist, N. S. 497, 499, also, Pollock, C. B., said, that there were many instances of the names of persons having been inserted without their knowledge in the books of railway companies.

(*p*) 17 & 18 Vict. c. 125; ss. 22—27.

(*q*) Sect. 103.

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Rules defining the rights of persons and property, or creating offences and assigning their punishment, are almost coeval with the existence of civil society; while the procedure, or mode of enforcing rights and carrying the sanctions of penal law into effect, are usually left for a long time, and to a certain extent ever must be left, to the discretion of the persons entrusted with the administration of justice. But our modern system of evidence probably owes its establishment to the following *secondary* causes: — 1. The independence of the judges on the crown, begun by the 12 & 13 Will. 3, c. 2, s. 3, and completed by the 1 Geo. 3, c. 23, which naturally had a considerable effect in preventing artificial distinctions being made between the proofs in state prosecutions and in other cases. 2. The allowing persons accused of treason or felony the right of being defended by counsel (*r*); the necessary consequence of which was that objections to the admissibility of evidence were much more frequently taken, the attention of the judges was more directed to the subject of evidence, their judgments were better considered, and their decisions more fully reported, and better remembered. 3. And principally, the gradual change effected in the constitution of the common law tribunal for the trial of matters of fact. As Serjeant Stephen observes, "it is a matter clear beyond dispute (but one that has perhaps been too little noticed in works that treat of the origin of our laws) that the jury anciently consisted of persons who were *witnesses* to the facts, or at least in some measure *personally cognizant* of them; and who,

law come to maturity before the adjective.

Secondary causes of the establishment of our modern system of evidence.

(*r*) In treason, by 7 & 8 Will. 3, c. 3, s. 1; and 20 Geo. 2, c. 30. Although persons accused of felony were not allowed to make their full defence by counsel until the 6 & 7 Will. 4, c. 114, yet for a long time before that statute, counsel were allowed to take and to argue legal objections for them, and even by connivance to examine and cross-examine witnesses. See bk. 4, pt. 1.

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consequently, in their verdict gave, not (as now) the conclusion of their judgment upon facts proved before them in the cause — but their testimony as to facts which they had antecedently known" (*s*). This circumstance, which is a key to so many of the common law rules of pleading, will throw considerable light on our system of judicial evidence. That the jury were witnesses of a particular kind, at least as late as the reign of Edw. I., and that they had ceased to be such in that of Charles II., perhaps much sooner, is indisputable. But in the meantime the system was in a sort of transition state (*t*); and it was not until the final

(*s*) Steph. Plead. 145, 5th Ed. See also *Id.* 480, and Append. note 33. To his authorities, which are indeed conclusive enough on this matter, we add the following. It was agreed by the court in *Rolfe* v. *Hampden*, T. 34 Hen. VIII. Dyer, 53 b, pl. 11, that the plaintiff in attaint could not give more evidence nor call more witnesses than he had given to the petit jury, but è contra the defendant might give more in affirmance of the first verdict. The functions of jurors and the distinction between them and other witnesses is strikingly pointed out in 23 Ass. pl. 11. It was proposed to challenge a witness to a deed because he was cousin to the plaintiff. "Et non allocatur, for the witnesses are not challengeable, because the verdict shall not be received from them, but from those of the assize, and the witnesses were sworn simply to say the truth, without saying to their knowledge (a lour estient), for they ought to testify nothing but what they *see* and *hear*." The same was held in the 12 Ass. pl. 11 & 41, in the former of which we are told, "The assize (the jury) came and were charged to say the truth of their knowledge (a lour science), and the witnesses without their knowledge (sans lour scient), to say the truth and loyally inform the inquest." See also 11 Ass. pl. 19.

(*t*) The authorities in the last note shew how this stood in the time of our early Plantagenet monarchs; the celebrated judgment of Vaughan, C. J., in *Bushell's case*, Vaugh. 135, fixes the practice in the latter part of the seventeenth century, nearly as it exists at the present day. The difficulty is to trace its progress in the intervening period. Fortescue, De Laud. Leg. Ang. cc. 26, 32, towards the close of the fifteenth century, considers the jury in the light of witnesses. Vavisor, J., a little later, in the 14 Hen. VII. 29 b, pl. 4, 2 Rol. Ab. 677, pl. 27; and Brooke, Recorder of London, *arguendo*, in the middle of the

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determination of that state that the rules of evidence, which depend so much on the functions of the component

next century, *Reniger* v. *Fogassa*, Plowd. 12, H. 4 Edw. VI., state it as clear that a jury may find their verdict without any evidence laid before them. So Staundf. P. C. 130 a, speaking of the stat. 1 Edw. 6, c. 12, says, "Mes bien garda le iuge, quant tielx parolx sont mises in lenditement, que ceux qui donont euidence, les dites parolx biē et substantialment prouont per lour euidence, auxi auant come le principal fact, et sils ne font, lessa le iuge admonisher le iury de ceo, s. que il ny ad ascun proofe de tielx polx per le euidence, et per tant nient tenus de le trouer, *sils ne conusteront ē de eux mesmes.*" "Albeit by the common law," says Sir Edward Coke, 3 Inst. 163, "trial of matters of fact is by the verdict of twelve men, &c., and deposition of witnesses is but evidenced to them; yet, for that *most commonly* juries are led by deposition of witnesses, &c." So late as the 17 Jac. I. (1619), Hobart, C. J., says (*Darcy* v. *Leigh*, Hob. 325), that he "observed the wisdom of the common law did allow none to be a juryman in ætate probandâ, that was not forty-two years; *for he tried things twenty-one years past*, and is not to be a juror till he be twenty-one years." And in Style's Prac. Reg. 335, 4th Ed. "A jury may find a thing which is not given unto them in evidence, if they do know it of their own knowledge, M. 22 Car. B. R. For they may inform themselves of the truth of the fact they are to try by all possible and lawful means they can, and are not solely tied to the evidence given at the bar." On the other hand however we find a case of *Lee* v. *Savile*, in Clayton's Pleas of Assize, 31, pl. 54, Summer Assizes, 11 Car. I. (1635), where it is stated that "the judge" (Barkley) "did put back the jury twice because they offered their verdict contrary to their evidence." The following case is reported in 1 Lilly, Pr. Reg. 552. "If any one of the jury that is sworn to try the issue, be desired to give his testimony concerning some matter of fact, that lies in his particular knowledge and concerns the matter in question, as evidence to his fellow jurors, the court will have him examined openly in court upon his oath touching his knowledge therein, and he is not to deliver his testimony in private unto his fellow jurors; 31 Oct. 1650, Mich. B. S. &c." And in *Wood* v. *Gunston*, M. 1655, Sty. 466, referred to in *Roe* v. *Hawkes*, 1 Lev. 97, a motion for a new trial having been made on the ground of excessive damages, and that the jury had favoured the plaintiff; it was objected, that "after verdict the partiality of the jury ought not to be questioned, nor is there any precedent for it in our books of the law, and it would be of dangerous consequence if it should be suffered, and the greatness of the damages given can be no cause for a new trial;" but Glyn, C. J.,

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parts of the judicial tribunal being clearly defined, could assume a permanent and consistent form. Other causes may have contributed, and indeed the above are only offered in the way of speculation.

The English system of judicial evidence a noble one, taken as a whole.

§ 120. But, whatever the age or origin of our system of judicial evidence, it is on the whole a noble one, and may fearlessly challenge comparison with all others. Its principal features stand out in strong and fine relief, while its leading rules are based on the most indisputable principles of truth and common sense. It

Defects in the system.

must not, however, even with all the improvements of modern legislation, be supposed perfect; on the contrary, it still has defects which its well-wishers behold with regret. The application of its great rules having occasionally fallen to the lot of unskilful or careless hands, the general outline has been in some places badly filled up, lines cross that ought to bound the domain of principles just in themselves, and the extension of which to cases where they are inapplicable has frequently been productive of injustice, and exposed the whole system to censure. Add to this, that the comparatively modern growth of the system has rendered it impossible to get rid at once either of all the erroneous principles, or of the many straight-laced applications of sound ones,

said, "It is in the discretion of the court in some cases to grant a new trial, but this must be a judicial, and not an arbitrary discretion, and it is frequent in our books for the court to take notice of miscarriages of juries, and to grant new trials upon them, and it is for the people's benefit that it should be so, for a jury may sometimes by indirect dealings be moved to side with one party, and not to be indifferent betwixt them, but it cannot be so intended of the court." In *Bayly* v. *Boorne*, 1 Str. 392, however, the court said the power of granting a new trial even in superior courts "is not of any great standing, the first instance of any new trial being in Stiles." These authorities are far from exhausting the subject, but it is needless to discuss it farther.

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which were established by our ancestors for themselves, or borrowed from the civilians of the middle ages.

§ 121. But besides these imperfections, which perhaps may be looked on as adventitious, our system has faults of a more positive kind. Thus, sufficient attention was not paid by its founders to *official pre-appointed evidence;* and although some steps have been taken in this direction by the 6 & 7 Will. 4, c. 86, and subsequent statutes for the registration of births, marriages and deaths; by the 1 & 2 Vict. c. 110, s. 9, and the 32 & 33 Vict. c. 62, s. 24, requiring professional attestation to cognovits and warrants of attorney to confess judgment; by various clauses of the Merchant Shipping Act, 17 & 18 Vict. c. 104 (*u*); and by the 20 & 21 Vict. c. 77, s. 91, establishing depositories for the wills of living persons, &c., there is still room for improvement; and the principles adopted in the laws of some foreign countries on this subject might, under due restrictions and with the required caution, be advantageously introduced here. Another defect of our system is the want of some cheap and expeditious means of perpetuating testimony. "Id observandum, aliquando hodie probationem suscipi ante litem contestatam, si reus prævideat, se conventum iri, et periculum sit, ne testes, quibus exceptionem suam judici probare queat, moriantur, vel alio migrent, vel si actor metuat, ne sibi testimonium propter testium morbum, vel absentiam pereat. Id quod doctores vocant probationem *in perpetuam rei memoriam*" (*v*). With the exception of the writs of "warrantia chartæ" (*x*), "curiâ claudendâ" (*y*) (both abolished by the 3 & 4 Will. 4, c. 27, s. 36), and a few other instances, the common law did not allow legal proceedings on the mere suspicion

(*u*) Sects. 107, 138, 175, n. 3, &c.

(*v*) Heinec. ad Pand. pars 4, § 125.

(*x*) F. N. B. 134 K, 8th Ed.

(*y*) F. N. B. 127 I, in marg. 8th Ed.

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of *intended* wrong or breach of duty; and it was probably in furtherance of this principle that it provided no general mode of perpetuating testimony, for which purpose it was necessary to have recourse to a bill in equity (*z*). But that process is circuitous, expensive, and frequently inadequate; and there can be little doubt that much valuable evidence is daily carried to the grave. It is however much easier to detect the disease than to point out the fitting remedy; and the difficulty of this subject has been felt by the lawgivers of other countries as well as our own (*a*). Steps in advance have, however, been taken by the 5 & 6 Vict. c. 69, and 30 & 31 Vict. c. 35, s. 6, passed to extend the means of perpetuating testimony in certain cases; by the Merchant Shipping Act, 17 & 18 Vict. c. 104, ss. 448, 449, relative to taking the examination of persons belonging to ships in distress; by the 21 & 22 Vict. c. 93, which enables persons to establish their legitimacy and the marriage of their parents and others from whom they may be descended, and to prove their own right to be deemed natural born subjects; and by the annual Mutiny Act (*b*) as to the mode of recording the settlements of soldiers, &c.

§ 122. Finally, the nomenclature of this branch of our jurisprudence is somewhat objectionable; a greater evil than might at first sight be imagined. Among the abuses of words one of our ablest metaphysicians classes the unsteady application, and affected obscurity by wrong application of them (*c*): and Lord Bacon shrewdly remarks, "Although we think we govern our words, and prescribe it well 'loquendum ut vulgus,

(*z*) 3 Blackst. Comm. 450; Com. Dig. Chancery R.; 2 Phill. Ev. 453, 10th Ed.

(*a*) See Domat, Lois Civiles, part. 1, liv. 3, tit. 6, sect. 3.

(*b*) See the last of them, 32 & 33 Vict. c. 4, s. 92.

(*c*) Locke on the Human Understanding, bk. 3, ch. 10, §§ 5, 6.

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sentiendum ut sapientes,' yet certain it is that words, as a Tartar's bow, do shoot back upon the understanding of the wisest, and mightily entangle and pervert the judgment" (*d*). Several important phrases in the law of evidence; such as "presumption," "best evidence," "written evidence," "hearsay evidence," "parol evidence," &c., have two, and some even more, different significations; and many idle arguments and erroneous decisions to be found in our books are clearly traceable to this ambiguity of language.

(*d*) Bacon's Advancement of Learning, bk. 2.

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BOOK II.

INSTRUMENTS OF EVIDENCE.

Instruments of Evidence.
Three kinds.

Instruments of evidence.

§ 123. By "Instruments of Evidence" are meant the media through which the evidence of facts, either disputed or required to be proved, is conveyed to the mind of a judicial tribunal (*a*). The word "instrument" has, however, both with ourselves and the civilians, a secondary sense, i. e. denoting a particular kind of document (*b*). These instruments of evidence are of three kinds:

Three kinds.

1. "Witnesses:"—persons who inform the tribunal respecting facts.
2. "Real Evidence"—evidence from things.
3. "Documents"—evidence supplied by material substances, on which the existence of things is recorded by conventional marks or symbols.

Although in natural order the subject of real evidence precedes that of witnesses, it will be more convenient to treat of the latter first, as it is by means of them that both real and documentary evidence are usually presented to the tribunal.

(*a*) "Instrumentorum nomine ea omnia accipienda sunt, quibus causa instrui potest: et ideo tam testimonia, quam personæ instrumentorum loco habentur." Dig. lib. 22, tit. 4, l. 1.

(*b*) See *infra*, pt. 3, and Heinec. ad Pand. pars 4, § 126.

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PART I.

WITNESSES.

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§ 124. A WITNESS may be defined, a person who gives evidence to a judicial tribunal (*a*). The term is also sometimes used in the sense of testimony, as when a witness is said to be "an evidence" for or against a party. This form of speech is, however, passing away, and is rarely used, except when a criminal is admitted to bear testimony against his accomplices, who is then said to turn "Queen's evidence." In dealing with this subject, we propose to consider— Witness—what.

1. What persons are compellable to give evidence.
2. The incompetency of witnesses; or, who are disqualified from giving evidence.
3. The grounds of suspicion of testimony.

Division of the subject.

(*a*) "Witness" seems perfectly synonymous with the Latin "testis," the etymology of which is somewhat difficult to trace. Ainsworth in his Latin Dictionary says, etym. in obscuro: but Stephan. Thesaurus Ling. Lat. says it is "ab eo dictus quòd tueatur statum causæ: vel quòd ante stet, quasi antestis, id est antestans." The "licet antestari" in Horace (Sat. lib. 1, 9) certainly gives some colour to this latter supposition, which is followed by most of the civilians. See Calvin's Lexicon Juridicum; Oldendorp's Lexicon Juris; Spiegelius's Lexicon Juris Civilis. The silence of our Law Dictionaries as to the derivation of "witness" is also remarkable. Sir Edward Coke, 4 Inst. 279, says it comes from the Saxon verb "Weten" (probably a mistake for witan), "Scire, quia de quibus sciunt testari debent, et omne sacramentum debet esse certæ scientiæ." The derivations given by this author are rather unsafe; but the Dictionaries of Bailey, Johnson, Richardson and Webster all agree that "witness" is of Saxon origin; and we still have the phrase "to wit."

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Chapter I.

WHAT PERSONS ARE COMPELLABLE TO GIVE EVIDENCE.

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Generally, all persons are compellable to give evidence.

§ 125. The law allows no excuse for withholding evidence which is relevant to the matters in question before its tribunals, and is not protected from disclosure by some principle of legal policy. A person therefore, who, without just cause, absents himself from a trial at which he has been duly summoned to attend as a witness; or a witness who refuses to give evidence, or to answer questions which the court rules proper to be answered, is liable to punishment for contempt (*a*). An

(*a*) The following case has been put in illustration of the universality of this rule:—"Were the Prince of Wales, the Archbishop of Canterbury, and the Lord High Chancellor, to be passing in the same coach, while a chimney-sweeper and a barrow-woman were in dispute about a halfpenny worth of apples, and the chimney-sweeper and the barrow-woman were to think proper to call upon them for their evidence, could they refuse it? No! most certainly not."—Bentham's Draft of a Code for the Organization of the Judicial Establishment in France, A.D. 1790, chap. 1, tit. 1. "We remember one case," says a writer in a legal periodical, "a prosecution for blasphemy, in which the defendant, by way of shewing the divided state of opinion on theological subjects, actually subpœnaed the heads of all the religious persuasions he could hear of, and when the day of trial arrived these found themselves all shuffled up together in the waiting-room—the Archbishop of Canterbury and the High Priest of the Jews being of the party."—

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exception exists in the case of The Sovereign, against whom, of course, no compulsory process of any kind can be used (*b*).

Exception—the Sovereign.

§ 126. Various matters privileged from disclosure on general grounds of public policy will be considered in another part of this work (*c*). But besides these, the law extends a *personal* privilege to witnesses, of declining to answer particular questions,—a privilege based on the principle of encouraging all persons to come forward with evidence in courts of justice, by protecting them as far as possible from injury or needless annoyance in consequence of so doing. It is therefore a settled rule that a witness is not to be compelled to answer any question, the answering which has a tendency to expose him to a criminal prosecution, or to proceedings for a penalty, or for a forfeiture even of an estate or interest. "Nemo tenetur seipsum accusare" (*d*). "Nemo tenetur seipsum prodere" (*e*). This is laid down in all our books (*f*), is the established practice of the courts, and is recognized by the stat. 46 Geo. 3, c. 37 (*g*); 26 & 27 Vict. c. 29, s. 7, &c. By 1 Will. 4, c. 22, s. 5, and 6 & 7 Vict. c. 82, s. 7, no witness examined under a commission shall be compelled to produce any writing or other document that he would not be compellable to produce at a trial, &c.; and the 14 & 15 Vict. c. 99, which (sect. 2) renders the parties to a cause competent

Privilege of witnesses in not answering particular questions.

Questions tending to criminate, or expose to penalty or forfeiture.

Law Mag. vol. 25, p. 364. When the Emperor Napoléon the First was on board the Bellerophon in the English waters, an attempt was made to detain him in this country by means of a subpœna to give evidence on a trial, but which it was found impossible to serve. Scott's Life of Napoléon, vol. 9, p. 96.

(*b*) See *infra*, chap. 2.

(*c*) Bk. 3, pt. 2, ch. 8.

(*d*) Hard. 139; Wing. Max. 486; Lofft. Max. 361; 10 Exch. 88; 3 H. & N. 363.

(*e*) 3 Bulst. 50; 4 Black. C. 296; 3 Mac. & G. 212; 10 Exch. 93; 2 Den. C. C. 434.

(*f*) Ph. & Am. Ev. 913, 914, 916; Tayl. Ev. § 1308, 5th Ed.; Stark. Ev. 204, 4th Ed.

(*g*) See that statute, *infra*.

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and compellable to give evidence according to the practice of the court; expressly provides (sect. 3) that nothing therein contained "shall render any person compellable to answer any question tending to criminate himself." The 19 & 20 Vict. c. 113, s. 5, for taking evidence here in relation to certain matters pending before foreign tribunals, enacts that every person examined under it "shall have the like right to refuse to answer questions tending to criminate himself, and other questions which a witness in any cause, &c. would be entitled to;" and a similar provision is contained in the 22 Vict. c. 20, s. 4, for taking evidence in proceedings pending before tribunals in the Queen's dominions, in places out of their jurisdiction, with reference to persons examined under that act. Whether a husband or wife is bound to answer questions tending to criminate each other seems unsettled (*h*). And, lastly, it is provided, by the 32 & 33 Vict. c. 68, s. 3, that no witness in any proceeding, whether a party to the suit or not, shall be liable to be asked or bound to answer any question tending to show that he or she has been guilty of adultery, unless such witness shall have already given evidence in the same proceeding in disproof of his or her alleged adultery (*i*). The peculiar language of the 14 & 15 Vict. c. 99, has given rise to the question, whether, when a party to a suit is examined as a witness, his privilege in not answering questions is not more limited than that of other witnesses, and confined to the case where the answer would tend to *criminate* him (*j*).

(*h*) See *R.* v. *The Inhabitants of Cliviger*, 2 T. R. 263; *R.* v. *The Inhabitants of All Saints, Worcester*, 6 M. & S. 194, 200, per Bayley, J.; *Cartwright* v. *Green*, 8 Ves. 405, 410.

(*i*) The legislature has also recognized the principle on several other occasions, either by depriving particular witnesses of the privilege, or by an act of indemnity rendering it valueless to them. Tayl. Ev. § 1310, 5th Ed., where various instances are collected.

(*j*) Tayl. Ev. § 1217, 5th Ed.; *May* v. *Hawkins*, 11 Exch. 210; 1 Jurist, N. S. 600.

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§ 127. The question need not be such that the answer to it would *directly* affect with criminality the witness or party interrogated, or subject him to a penalty or forfeiture; it is sufficient if the answer would form a link in a chain of evidence which might induce any of those consequences (*k*). In one case (*l*) Pollock, C. B., went farther, laying it down, incidentally, for it was unnecessary to the decision of the point before the court, that it did not at all follow that the witness who is privileged from answering must be guilty of an offence; that a man may be placed in such circumstances connected with the commission of a crime, that if he disclosed them he would be fixed on by his hearers as the guilty person, and he might not be able to explain those circumstances, so that the rule is not always the shield of guilt—it may be the protection to innocence. In the absence of more distinct authority, it is not easy to say whether this notion is well founded. Possibly such cases may fall within one or both of the principles, "Nemo tenetur seipsum *accusare*" (*m*), "Nemo tenetur se infortuniis et periculis exponere" (*n*); in furtherance of the latter of which, a party under the necessity of making continual claim to lands, was not bound to approach them more closely than was consistent with his personal safety (*o*).

§ 128. When the grounds of privilege are before the court, it is for the court, and not for the witness or party interrogated, to decide as to their sufficiency (*p*). But

(*k*) *Fisher* v. *Ronalds*, 12 C. B. 765, per Maule, J.; *Osborn* v. *The London Dock Company*, 10 Exch. 701, per Alderson, B.; *The People* v. *Mather*, 4 Wend. 253; *Paxton* v. *Douglas*, 19 Ves. 226, 227; *Short* v. *Mercier*, 3 Mac. & G. 218; Mitford's Pl. 359, 5th Ed.

(*l*) *Adams* v. *Lloyd*, 4 Jurist, N. S. 593; *S. C.*, 3 H. & N. 363.

(*m*) *Supra*, § 126.

(*n*) Co. Litt. 253 b.

(*o*) Litt. sect. 419 *et seq.*

(*p*) In *Re The Mexican and South American Company, Ex parte Aston*, 27 Beav. 474, affirmed on appeal, 4 De Gex & J. 320; *Ex parte Fernandez*, 10 C. B., N. S. 3, 40, per Willes, J.

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much difference of opinion has been expressed of late years, as to whether, if a witness or party interrogated objects to answering a particular question, alleging on oath that the answer would tend to expose him to crimination, penalty, or forfeiture, the court is bound to disallow the question, even though it does not see in what possible way the answer to it could have that effect. This question arose in *R.* v. *Garbett* (*q*), on a case reserved, which was, however, ultimately decided on another point. In *Fisher* v. *Ronalds* (*r*), Jervis, C. J., and Maule, J., laid down in the most unequivocal terms, that the court is bound by the statement on oath of the witness; and their language was cited with approbation in *Adams* v. *Lloyd* (*s*) by Pollock, C. B., but with this qualification, that the judge must be perfectly certain that the witness is not trifling with the authority of the court, and availing himself of the rule of law to keep back the truth, having in reality no ground whatever for claiming the privilege. The whole doctrine was, however, distinctly denied by Parke, B., in *Osborn* v. *The London Dock Company* (*t*), and by Stuart, V. C., in *Sidebottom* v. *Adkins* (*u*), the latter of which is an express decision on the subject, the others being only dicta unnecessary for the determination of the cases in which they are found. It was also gravely doubted by Willis, J., in *Ex parte Fernandez* (*v*). In support of the exclusive right of the witness or party interrogated, it was urged that, as he alone can know in what way the answer to any particular question could affect him, the requiring him to explain this to the court would be a virtual denial of the privilege; seeing that it is impossible to affirm à priori that any imaginable fact can

(*q*) 1 Den. C. C. 236; 2 Car. & K. 474.

(*r*) 12 C. B. 762; 22 L. J., N. S., C. P. 62; 17 Jurist, 393.

(*s*) 3 H. & N. 361, 362; 27 L. J., N. S., Exch. 499; 4 Jur., N. S. 590.

(*t*) 10 Exch. 701; 1 Jur., N. S. 93.

(*u*) 3 Jur., N. S. 631, 632.

(*v*) 10 C. B., N. S. 3, 39.

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under no possible circumstances whatever become evidentiary, either immediately or mediately, of any other. That as, when a witness called on to produce documents under a subpœna duces tecum, swears that they are his muniments of title, the court always excuses him from producing them (*w*), a similar rule ought to prevail when under an ordinary subpœna a witness is asked questions, the answers to which may be equally or even more injurious to him. On the other hand, however, it is to be remembered that the judge is the proper authority to determine all questions relative to the reception of testimony; and consequently to decide whether, taking into consideration all the circumstances, including the demeanor of the person who claims the privilege, an answer to any particular question ought to be exacted (*x*): and that the allowing the witness or party interrogated the exclusive right contended for, would not only introduce an anomaly into the law of evidence, but enable every witness, who might be swayed by improper motives, and indifferent to his reputation, easily, and with perfect impunity, to evade giving any evidence whatever. The position that a witness, or party interrogated, ought not to be compelled to shew in what precise way a question might injure him, however sound in itself, falls far short of establishing that he is the exclusive judge, not only as to the existence of the facts which might expose him to injury, but also as to the effect of those facts in point of law. Besides, it is a mistake to suppose that every unfounded objection raised by a witness to a question must necessarily have its foundation in mala fides; it may be the result of idle terror or scruples, to give effect to which would be a violation of the well-known principle of law, that the fear which excuses an act must not be a vain fear, but a reasonable one, "Qui cadere potest in virum con-

(*w*) Tayl. Ev. §§ 428, 1318, 4th Ed.

(*x*) *The People* v. *Mather*, 4 Wend. 229, 254.

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stantem" (*y*). The rule that a witness will not be compelled to produce documents which he swears are his muniments of title, is in a great degree the offspring of necessity; being based on the immediate and irreparable mischief which would ensue from an erroneous decision of the judge as to the nature of the documents. Still we apprehend, that if it could be clearly shewn that the statement of the witness as to their character was untrue, the judge would compel their production.

§ 128.* The whole question came at last before the Queen's Bench in *Reg.* v. *Boyes* (*z*), where the dicta in *Fisher* v. *Ronalds* were distinctly overruled by an unanimous decision of that court. That was an information filed by the Attorney-General in pursuance of a resolution of the House of Commons, for bribery at an election for members to serve in parliament; and at the trial, Martin, B., held that a witness who had been pardoned for his share in the transaction was bound to answer questions concerning it. On this ruling being questioned before the Court in Banc, consisting of Cockburn, C. J., Wightman, Crompton and Blackburn, JJ., it was argued that the witness was in jeopardy by being compelled to answer; for although the Crown could pardon offences as regards itself, the witness was still liable to an impeachment by the House of Commons, against which, by 12 & 13 Will. 3, c. 2, s. 3, no pardon of the Crown could be pleaded. The case was argued, and *Fisher* v. *Ronalds* and some other authorities were referred to. After time taken to consider, the following judgment was delivered by Cockburn, C. J., in the name of himself and the other members of the court. "It was contended that a bare possibility of legal peril was sufficient to entitle a witness to protection: nay, further, that the witness was the sole

(*y*) Co. Litt. 253 b; Lofft's Max. 440. See also Dig. lib. 50, tit. 17, l. 184.

(*z*) 1 B. & S. 311.

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judge as to whether his evidence would bring him into danger of the law: and that the statement of his belief to that effect, if not manifestly made malâ fide, should be received as conclusive. With the latter of these propositions we are altogether unable to concur. Upon a review of the authorities, we are clearly of opinion that the view of the law propounded by Lord Wensleydale, in *Osborn* v. *The London Dock Company* (*a*), and acted upon by Vice-Chancellor Stuart, in *Sidebottom* v. *Adkins* (*b*), is the correct one; and that, to entitle a party called as a witness to the privilege of silence, the court must see, from the circumstances of the case and the nature of the evidence which the witness is called to give, that there is reasonable ground to apprehend danger to the witness from his being compelled to answer. We indeed quite agree that, if the fact of the witness being in danger be once made to appear, great latitude should be allowed to him in judging for himself of the effect of any particular question: there being no doubt, as observed by Alderson, B., in *Osborn* v. *The London Dock Company* (*b*), that a question which might appear at first sight a very innocent one, might, by affording a link in a chain of evidence, become the means of bringing home an offence to the party answering. Subject to this reservation, a judge is, in our opinion, bound to insist on a witness answering unless he is satisfied that the answer will tend to place the witness in peril. Further than this, we are of opinion that the danger to be apprehended must be real and appreciable, with reference to the ordinary operation of law in the ordinary course of things—not a danger of an imaginary and unsubstantial character, having reference to some extraordinary and barely possible contingency, so improbable that no reasonable man would suffer it to influence his conduct. We think that a merely remote and naked possibility, out of the ordinary course of the

(*a*) 10 Exch. 698, 701. (*b*) 3 Jur., N. S. 631.

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law and such as no reasonable man would be affected by, should not be suffered to obstruct the administration of justice. The object of the law is to afford to a party, called upon to give evidence in a proceeding inter alios, protection against being brought by means of his own evidence within the penalties of the law. But it would be to convert a salutary protection into a means of abuse if it were to be held that a mere imaginary possibility of danger, however remote and improbable, was sufficient to justify the withholding of evidence essential to the ends of justice. Now, in the present case, no one seriously supposes that the witness runs the slightest risk of an impeachment by the House of Commons. No instance of such a proceeding in the unhappily too numerous cases of bribery which have engaged the attention of the House of Commons has ever occurred, or, so far as we are aware, has ever been thought of. To suppose that such a proceeding would be applied to in the case of this witness would be simply ridiculous; more especially as the proceeding by information was undertaken by the Attorney-General by the direction of the House itself, and it would therefore be contrary to all justice to treat the pardon provided, in the interest of the prosecution, to ensure the evidence of the witness, as a nullity, and to subject him to a proceeding by impeachment. It appears to us, therefore, that the witness in this case was not, in a rational point of view, in any the slightest real danger from the evidence he was called upon to give when protected by the pardon from all ordinary legal proceedings; and that it was therefore the duty of the presiding judge to compel him to answer."

§ 129. It used to be considered that the witness who intended to claim the privilege of not answering questions of this nature was bound to claim his privilege at once; if he began a criminative statement when he

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might have refused to make it, he was compellable to go on with it: a rule probably established with the view of preventing witnesses from converting the privilege given by law for their own protection, into a means of serving one of the litigant parties, by setting up the privilege when their evidence began to tell against him. But in *R.* v. *Garbett* (*d*) a majority of the judges overruled the old notion, and held that the witness might claim his protection at any stage of the inquiry.

Questions tending to disgrace.

§ 130. Whether a witness is compellable to answer questions having a tendency to *disgrace* him; as for instance, whether he was ever convicted of an offence, or had suffered some infamous punishment, or been in gaol on a criminal charge, is a great question in our books, and one on which any attempt to reconcile the authorities would be perfectly hopeless. It is indeed settled that he must answer if the question is relevant to the issue in the cause (*e*): the doubt is when it relates to collateral matters, and is only put in order to test his credit. The arguments pro and con are thus stated in a work of authority (*f*): "There seems to be no reported case, in which this point has been solemnly determined; and, in the absence of all express authority, opinions have been much divided. The advocates for a compulsory power in cross-examination might argue, that as parties are frequently surprised by the appearance of a witness unknown to them, or, if known, entirely unexpected, without such power they would have no adequate means of ascertaining what credit is due to his testimony; that on the cross-examination of spies, informers, and accomplices, this power is more particularly necessary: and that if a witness may not be questioned as to his character at the moment of trial, the property and

(*d*) 1 Den. C. C. 236; 2 Car. & K. 495.

(*e*) 2 Phill. Ev. 494, 10th Ed.; Ph. & Am. Ev. 916, 917.

(*f*) 2 Phill. Ev. 494, 10th Ed.

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even the life of a party must often be endangered.—Those, on the other side, who maintain, that a witness is not compellable to answer such questions, may contend to the following effect. They say, the obligation to give evidence arises from the oath, which every witness takes; that by this oath he binds himself only to speak touching the matters in issue; and that such particular facts as these—whether the witness has been in gaol for felony or suffered some infamous punishment, or the like,—cannot form any part of the issue, as appears evident from this consideration, that the party, against whom the witness is called, would not be allowed to prove such particular facts by other witnesses. They may argue, further, that it would be an extreme grievance to a witness, to be compelled to disclose past transactions of his life, which may have been since forgotten, and to expose his character afresh to evil report and obloquy, when perhaps by subsequent conduct he may have recovered the good opinion of the world; that if a witness is privileged from answering a question, though relevant to the matters in issue, because it may tend to subject him to a forfeiture of property, with much more reason ought he to be excused from answering an irrelevant question to the disparagement and forfeiture of his character; that in the case of accomplices, in which this compulsory power of cross-examination is thought to be more particularly necessary, the power may be properly conceded to a certain extent, because accomplices stand in a peculiar situation, being admitted to give evidence only under the implied condition of making a full and true confession of the whole truth; but even accomplices are not to be questioned, in their cross-examination, as to other offences in which they have not been concerned with the prisoner: lastly, that with respect to witnesses, in general, the best course to be adopted, both in point of convenience and justice, is to allow the question to be asked, at the same time

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allowing the witness to shelter himself under his privilege of refusing to answer, and, if he refuses, to leave it to the jury to draw their own conclusion as to his motives for such refusal. Although there appears not to be any express decision on the point, whether a witness is compellable to answer questions degrading to his character, yet several opinions have been pronounced by judges of great authority, from which it may be collected that the witness is not compellable to answer such questions." In support of this view the following authorities are then cited. — *Cook's case* (*g*), *Sir J. Friend's case* (*h*), *Layer's case* (*i*), *R.* v. *Lewis* (*k*), *Macbride* v. *Macbride* (*l*), and *R.* v. *O'Coigly, O'Connor and others* (*m*). The first three of these are taken from the State Trials, the latest of which was decided in 1722; and the second is only a dictum, for the point was whether a witness was bound to say was he a Roman Catholic, the answering which in the affirmative would in those days have exposed him to a *penalty* (*n*). The fourth and fifth prove too much, for in them the judges ruled that questions such as we are now considering could not be *put*,—a position clearly erroneous (*o*); and in the sixth it is not easy to collect on what precise ground the decision of the court proceeded, as they do not assign any reasons for it. To these are commonly added *Dodd* v. *Norris* (*p*), *R.* v. *Hodgson* (*q*), and *Millman* v. *Tucker* (*r*); but in the first two the question involved a charge of fornication, and as such the answer might have rendered the party liable to be proceeded against in the Ecclesiastical Court. The same view is

(*g*) 13 Ho. St. Tr. 334.
(*h*) *Id.* 16, 17.
(*i*) 16 *Id.* 161.
(*k*) 4 Esp. 225.
(*l*) *Id.* 242.
(*m*) 26 Ho. St. Tr. 1353.
(*n*) See *R.* v. *Lord George Gordon*, 2 Dougl. 593.
(*o*) Ph. & Am. Ev. 920 *et seq.*; 2 Phill. Ev. 497 *et seq.*, 10th Ed.; Stark. Ev. 213, 4th Ed.; Ros. Crim. Ev. 166, 4th Ed.
(*p*) 3 Camp. 519.
(*q*) R. & R. C. C. 211.
(*r*) Peake's Add. Ca. 222.

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also supported by the old cases, in the State Trials, of *Reading* (*s*) and the *Earl of Shaftesbury* (*t*). On the other hand, however, there are several modern authorities expressly in point the other way; viz. *R.* v. *Edwards* (*u*), *Frost* v. *Holloway* (*x*), and *Cundell* v. *Pratt* (*y*), to which may be added *Roberts* v. *Allatt* (*z*); and the same is indirectly established by other cases, which show that if such questions are put the witness's answer must be taken, and that he cannot be contradicted by fresh evidence (*a*). We apprehend that *in strictness* the courts can compel a witness to answer under such circumstances, but that in the exercise of their discretion they will not do so, unless the ends of justice clearly require it; which however seldom happens, as in general the object of the cross-examining party is sufficiently attained by *putting* the question; for the silence of a person, to whom in his hearing a crime or disgraceful act is imputed, is in many instances tantamount to confession. "No doubt," says a modern work on Evidence (*b*), "cases may arise where the judge, in the exercise of his discretion, would very properly interpose to protect the witness from unnecessary and unbecoming annoyance. For instance, all inquiries into discreditable transactions of a remote date might, in general, be rightly suppressed; for the interests of justice can seldom require that the errors of a man's life, long since repented of, and forgiven by the community, should be recalled to remembrance at the pleasure of any future litigant. So, questions respecting alleged improprieties of conduct, which furnish no real ground for assuming that a witness who could be guilty of them

(*s*) 7 Ho. St. Tr. 296.
(*t*) 8 *Id.* 817.
(*u*) 4 T. R. 440.
(*x*) Ph. & Am. Ev. 922, note; 2 Phill. Ev. 500, 10th Ed.
(*y*) 1 M. & M. 108.
(*z*) *Id.* 192.
(*a*) Ph. & Am. Ev. 923; 2 Ph. Ev. 501, 10th Ed.
(*b*) Tayl. Ev. §§ 1314, 1315, 5th Ed.

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would not be a man of veracity, might very fairly be checked. But the rule of protection should not be further extended; for, if the inquiry relates to transactions comparatively recent, bearing directly upon the moral principles of the witness, and his present character for veracity, it is not easy to perceive why he should be privileged from answering, notwithstanding the answer may disgrace him. It has, indeed, been termed a harsh alternative to compel a witness either to commit perjury or to destroy his own reputation; but, on the other hand, it is obviously most important, that the jury should have the means of ascertaining the character of the witness, and of thus forming something like a correct estimate of the value of his evidence. Moreover, it seems absurd to place the mere feelings of a profligate witness in competition with the substantial interests of the parties in the cause."

By the 17 & 18 Vict. c. 125, sects. 25, 103, a witness in a civil case may be questioned as to whether he has been *convicted* of any felony or misdemeanor, and if he either denies the fact or refuses to answer, the opposite party may prove the conviction. And by 28 Vict. c. 18, s. 6, which applies "to all courts of judicature, as well criminal as all others, and to all persons having, by law or by consent of parties, authority to hear, receive, and examine evidence" (*c*). A witness may be questioned as to whether he has been *convicted* of any felony or misdemeanor, and upon being so questioned, if he either denies or does not admit the fact, or refuses to answer, it shall be lawful for the cross-examining party to prove such conviction.

Questions tending to subject to civil proceedings.

§ 131. It was formerly a disputed point whether witnesses were compellable to answer questions the answers to which would subject them to *civil* proceedings (*d*).

(*c*) Sect. 1.

(*d*) 2 Phill. Ev. 492, 493, 10th Ed.; Stark. Ev. 203, 204, 4th Ed.

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To set this matter at rest the 46 Geo. 3, c. 37, was passed, which, after reciting the existing doubts on the subject, proceeded to *declare* and enact, that "a witness cannot by law refuse to answer a question relevant to the matter in issue, the answering of which has no tendency to accuse himself or to expose him to penalty or forfeiture of any nature whatsoever (*e*), by reason only, or on the sole ground, that the answering of such question may establish or tend to establish that he owes a debt, or is otherwise subject to a civil suit."

(*e*) As to the nature and extent of the forfeiture spoken of, see *Pye* v. *Butterfield*, 5 B. & S. 829, and the cases there referred to.

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Chapter II.

INCOMPETENCY OF WITNESSES.

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Presumption in favour of human testimony.

§ 132. As the reception of and credit attached to the statements of witnesses by courts of justice rest on the natural, if not instinctive, belief which is found to exist in the human mind (*a*), in the *general* veracity of human testimony, especially when guarded by the sanction of an oath, it follows that all testimony delivered under that sanction, and perhaps even without it, ought to be heard and believed until special reason appears for doubt or disbelief. And here arises a leading distinction which runs through the judicial evidence of this and most other countries; namely, that in some instances the special reason is so obvious that the law deems it safer to reject the testimony of the witness altogether, while in others it allows the witness to make his statement, leaving its truth to be estimated by the tribunal (*b*). This is the distinction taken in our books

Distinction between the competency and the credibility of witnesses.

(*a*) Introd. pt. 1, § 15.

(*b*) "Summa distinctio et observatio est, testes aut prohiberi penitùs, aut reprobari duntaxat.

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between the *competency* and the *credibility* of witnesses. A witness is said to be *incompetent* to give evidence when the judge is bound as matter of law to reject his testimony, either generally or on some particular subject; in all other cases it is to be received and its credibility weighed by the jury. The present chapter will be confined to the *incompetency* of witnesses. Incompetency.

§ 133. Incompetency in a witness will not be presumed. It comes in the shape of an exception or objection to the witness; and if the facts on which it rests are disputed they must, like all other collateral questions of fact (*c*), be determined by the judge (*d*); who, in cases of doubt, is always disposed to receive the witness, and let the objection go to his credibility rather than to his competency. In many cases the ground of incompetency is apparent to the senses of the judge; as where a witness presents himself in a state of intoxication (*e*), or is an obvious lunatic (*f*), or of such tender years that the judge deems a preliminary inquiry into his religious knowledge essential (*g*), and the like. But the ordinary mode of ascertaining whether a witness is competent is by examining him on what is called the *voir dire, i. e.* a sort of preliminary examination by the judge, in which the witness is required to speak the truth with respect to the questions put to him; when, if incompetency appears from his answers, he is rejected (*h*), and even if they are satisfactory the judge Not presumed. How ascertained.

Probibentur, qui planè non audiuntur; Reprobantur, quibus auditis aliquid objici potest, quo minus fidem mereantur." Huberus, Præl. Jur. Civ. lib. 22, tit. 5, n. 1. See 1 Hale, P. C. 635; 2 *Id.* 276-7.

(*c*) Bk. 1, pt. 1, § 82.

(*d*) *Bartlett* v. *Smith*, 11 M. & W. 483; *R.* v. *Hill*, 2 Den. C. C. 254.

(*e*) See the judgment in *Mansell* v. *Reg.*, 1 Dearsl. & B. 405. "Ebrietas probatur ex aspectu illius qui asseritur ebrius, &c." Masc. de Prob. Concl. 579, nn. 5 *et seq.*

(*f*) *Infrà.*

(*g*) *Infrà.*

(*h*) *Yardley* v. *Arnold*, 10 M. & W. 141; *Jacobs* v. *Layborn*, 11 M. & W. 685; *Doe* d. *Norton* v. *Webster*, 12 A. & E. 442.

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may receive evidence to contradict them or establish other facts shewing the witness to be incompetent (*i*). It sometimes happens that the incompetency of a witness is not discovered until after he has been sworn, and his examination proceeded with a considerable way, or perhaps even brought to a close; under which circumstances the judge ought, it seems, to erase that witness's evidence from his notes, and tell the jury to pay no attention to it (*k*). It has been said, also, that although in regular order the examination on the voir dire precedes the examination in chief; yet, when a ground of incompetency is thus unexpectedly discovered, the judge may stop the proceedings, and examine on the voir dire with the view of ascertaining the fact (*l*).

Grounds on which witnesses may be rejected unheard.

§ 134. The only grounds on which the evidence of a witness can with any appearance of reason be rejected, *unheard*, are reducible to four. 1. That he has not that degree of intellect which would enable him to give a rational account of the matters in question. 2. That he cannot or will not guarantee the truth of his statements by the sanction of an oath, or what the law deems its equivalent. 3. That he has been guilty of some crime or misconduct, shewing him to be a person on whose veracity reliance would most probably be misplaced. 4. That he has a personal interest in the success or defeat of one of the litigant parties. In a word, his rejection should be based on the reasonable apprehension, arising from known circumstances, that his evidence may mislead the tribunal and so cause misdecision. But various classes of persons were re-

Abuses of the

(*i*) *Bartlett* v. *Smith*, 11 M. & W. 483; *Cleave* v. *Jones*, 7 Exch. 421.

(*k*) See *Jacobs* v. *Layborn*, 11 M. & W. 685; and the authorities there cited; *R.* v. *Whitehead*, L. R., 1 C. C. 35; 1 Cox, C. C. 234.

(*l*) Per Rolfe, B., in *Jacobs* v. *Layborn*, *ut suprà*. See also the resolution of the judges in the *Queen's case*, 2 B. & B. 284.

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jected by the civilians and our old lawyers on a very different ground, viz., that the giving evidence in a court of justice is a right or privilege rather than a duty, and consequently that incompetency to give evidence is a fitting punishment for matters to which the law is desirous of attaching a stigma. And although this is a fallacious and short-sighted view even when the offence stigmatised is a grave violation of natural or municipal law, the ancient practice went much farther, and affixed the brand of incompetency on erroneous or obnoxious opinions; thus not only punishing the delinquent, but often inflicting ruin on the plaintiff, defendant, prosecutor, or accused person, whose life, property or honour might have been saved by the evidence of the rejected witness, whose doctrines he might nevertheless have held in due abhorrence. There can be no doubt that this mischievous principle was borrowed from the civil law, or, to speak more correctly, from those forms of it which prevailed in the lower empire and the middle ages (*m*). Most of the provisions on the immediate subject are to be found in Cod. lib. 1, tit. 5; according to the 21st constitution of which, bearing date A.D. 532, heretics and Jews were not in general allowed to bear testimony against orthodox Christians. Where heretics or Jews were parties, the evidence of heretics and Jews was receivable, the emperor observing, "concedimus dignos litigatoribus etiam testes introducere;" as it also was in certain other cases from necessity, "ne probationum facultas angustetur;" but the testimony of Pagans, Manichæans, and some other sects, was rejected under all circumstances (*n*). Very similar rules were acted on by the canonists (*o*). In former times in this country, when ecclesiastical dogmas were enforced by the secular

principle of incompetency.

(*m*) See Bonnier, Traité des Preuves, §§ 185 *et seq.*

(*n*) See this constitution at length, Introd. pt. 2, § 63, n. (*b*).

(*o*) Lancel. Inst. Jur. Can. lib. 3, tit. 14, § 19; Ayl. Par. Jur. Can. Angl. 448; Devot. Inst. Canon. lib. 3, tit. 9, § 13.

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arm, and the writ de hæretico comburendo was in force, the open profession of infidelity was rare, and Jews had been expelled from the kingdom in the reign of Edw. I., so that very explicit information on this subject cannot be expected from our early lawyers. Sir Edward Coke, indeed, in his First Institute, lays down broadly that an infidel cannot be a witness (*p*), but cites no authority. In *Calvin's case* also (*q*) he says, "All infidels are in law perpetui inimici, perpetual enemies (for the law presumes not that they will be converted, that being remota potentia, a remote possibility), for between them, as with the devils, whose subjects they be, and the Christian, there is perpetual hostility, and can be no peace." For this the only authorities cited, besides one of those passages of Scripture which are commonly strained for similar purposes, are the 12 Hen. VIII. fol. 4 a, pl. 3, and the Regist. Brev. Orig. 282, b; the former of which is a mere dictum by Brook, J., that a pagan cannot maintain an action; and the latter is an extract from a writ relative to the Knights Hospitallers, in which their institution is described as founded "in tuitionem et defensionem universalis et sacrosanctæ ecclesiæ contra Christi et Christianorum inimicos." In another of his works also (*r*), he tells us that the passage in Bracton where it is stated that an alien born cannot be a witness must be intended of an alien infidel. Whether Coke did not overstate the bigotry even of his own time may be questioned, but certain it is that within half a century after his death very different notions had arisen; and the whole subject will be best understood from the following powerful exposé of the fallacy of his views by L. C. J. Willes, in his judgment in *Omichund* v. *Barker* (*s*). "As to the general question, Lord Coke has resolved it in the negative, Co. Litt. 6 b, that an infidel cannot be a witness; and it is

(*p*) Co. Litt. 6 b.
(*q*) 7 Co. 17.
(*r*) 4 Inst. 279.
(*s*) Willes, 541.

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plain by this word 'infidel' he meant Jews as well as heathens, that is, all who did not believe the Christian religion. In 2 Inst. 507, and many other places, he calls the Jews *infidel Jews;* and in the 4 Inst. 155, and in several other passages of his books, he makes use of this expression, *infidel pagans*, which plainly shows that he comprised both Jews and heathens under the word infidels; and, therefore, Serjeant Hawkins (though a very learned painstaking man) is plainly mistaken in his History of the Pleas of the Crown, vol. 2, p. 434, where he understands Lord Coke as not excluding the Jews from being witnesses, but only heathens. But Lord Chief Justice Hale understood this in another sense in that remarkable passage of his, which I shall mention more particularly by-and-bye. I shall, therefore, take it for granted that Lord Coke made use of the word 'infidels' here in the general sense; and that will, I think, greatly lessen the authority of what he says; because long before his time, and of late, almost ever since the Jews have returned into England, they have been admitted to be sworn as witnesses. But, I think, the counsel for the defendant seemed to mistake the reason upon which Lord Coke went. For he certainly did not go upon this reason, that an infidel could not take a Christian oath, and that the form of the oath cannot be altered but by act of parliament; but upon this reason, though, I think, a much worse, that an infidel was not *fide dignus*, nor worthy of credit; for he puts them in company and upon the level with stigmatized and infamous persons. And that this was his meaning appears more plainly by what he says in *Calvin's case.* (The Lord Chief Justice here cites the passage already quoted (*t*)). But this notion, though advanced by so great a man, is, I think, contrary not only to the Scripture but to common sense and common humanity. And I think that even the devils themselves, whose

(*t*) *Suprà*, p. 192.

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subjects he says the heathens are, cannot have worse principles; and besides the irreligion of it, it is a most impolitic notion, and would at once destroy all that trade and commerce from which this nation reaps such great benefits. * * * * I have dwelt the longer upon this saying of his, because I think it is the only authority that can be met with to support this general assertion, that an infidel cannot be a witness. For though it may be founded upon some general sayings in Bracton, Fleta and Britton, and other old books, those I think of very little weight, and therefore shall not repeat them; first, because they are only general dicta; and in the next place because these great authors lived in very bigoted popish times, when we carried on very little trade except the trade of religion, and consequently our notions were very narrow, and such as I hope will never prevail again in this country. As to what is said by that great man the Lord Chief Justice Fortescue, in his book De Laudibus, cap. 26, that witnesses are to be sworn on the holy evangelists, he is speaking only of the oath of a *Christian*, and plainly had not the present question at all in his contemplation. To this assertion of my Lord Coke's (besides what I have already said), I will oppose the practice of this kingdom before the Jews were expelled out of it by the stat. 18 Edw. 1. For it is plain both from Madox's History of the Exchequer, pp. 167 and 174, and from Selden, vol. ii. p. 1469 (*u*), that the Jews here in the time of King John and Henry III. were both admitted to be witnesses, and likewise to be upon juries in causes between Christians and Jews, and that they were sworn upon their own books, or their own roll, which is the same thing (*v*). I will likewise oppose the constant practice here almost ever since the Jews have been

(*u*) Selden's Works by Wilkins, in six vols., A.D. 1726.

(*v*) See in further illustration of this the case of *Cok. Hagin*, Memoranda in Scacc. M. 3 Edw. I., and that in the 9th Edw. I., as cited Dyer, 144 a, pl. 59, in marg.

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permitted to come back again into England; viz., from the 19 Car. II. (when the cause was tried which is reported, 2 Keb. 314), down to the present times, during which I believe not one instance can be cited in which a Jew was refused to be a witness and to be sworn on the Pentateuch. To this assertion I shall likewise oppose the very great authority of Lord Hale, vol. 2, p. 279. * * * 'It is said by my Lord Coke that an infidel is not to be admitted as a witness, the consequence whereof would also be, that a Jew (who only owns the Old Testament) could not be a witness. But I take it, that although the regular oath, as it is allowed by the laws of England, is *tactis sacrosanctis Dei evangeliis*, which supposeth a man to be Christian, yet in cases of necessity, as in foreign contracts between merchant and merchant, which are many times transacted by Jewish brokers, the testimony of a Jew, *tacto libro legis Mosaicæ*, is not to be rejected, and is used, as I have been informed, among all nations. Yea, the oaths of idolatrous infidels have been admitted in the municipal laws of many kingdoms, especially *si juraverint per verum Deum creatorem*, and special laws are instituted in Spain touching the form of the oaths of infidels. Vide Covarruviam, Tom. 1. Part. 1. de formâ juramenti.' And he mentions a case where it would be very hard if such an oath should not be taken by a Turk or Jew (*x*), which he holds binding; for possibly he might think himself under no obligation if he were sworn according to the usual style of the courts of England. 'But then it must be agreed, that the credit of such testimony must be left to the jury.' * * * The last answer that I shall give to this assertion of Lord Coke's, as explained in *Calvin's case*, are his own words in his 4 Inst. 155. '*Fœdus pacis* or commercii,' (saith he,)

(*x*) i. e. If a murder committed in England in presence only of a Turk or a Jew should be disparishable because he could not take an oath which would be binding on his conscience.

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'though not *mutui auxilii*, may be stricken between a Christian prince and an infidel pagan; and as these leagues are to be established by oath, a question will arise whether the infidel or pagan prince may swear in this case by false gods, since he thereby offendeth the true God by giving worship to false gods. This doubt' (saith he) 'was moved by Publicola to Saint Augustine, who thus resolveth the same; He that taketh the credit of him who sweareth by false gods, not to any evil but good, he doth not join himself to that sin of swearing by devils, but is partaker with those lawful leagues wherein the other keepeth his faith and oath: but if a Christian should any ways induce another to swear by them, he would grievously sin. But seeing that such deeds are warranted by the word of God, all incidents thereto are permitted.' This is (I think) as inconsistent as possible with his notion that an infidel is not *fide dignus*, and a full answer to what he said in *Calvin's case* on this head; and therefore I shall leave him here, having (as I think) quite destroyed the authority of his general rule, that none but a Christian ought to be admitted as a witness."

§ 135. But although these rational and enlightened views had gained considerable ground during the seventeenth and early part of the eighteenth centuries (*y*), they cannot be said to have been *established* until the great case of *Omychund* (or *Omichund*) v. *Barker* (*z*), in 1744—5, when the whole matter was fairly brought before a high tribunal, whose deliberate decision forms

(*y*) In the case of *Fachina* v. *Sabine*, at the Council, 2 Str. 1104, Dec. 1731, a Moor was sworn on the Koran; and so far back as Mich. 1657, a witness who objected to lay his hand on the book and kiss it, was allowed to swear, it being laid open before him and he holding up his right hand. *Colt* v. *Dutton*, 2 Sid. 6.

(*z*) 1 Atk. 21. There is a very short note of it in 1 Wils. 84; and the judgment of Willes, C. J., is given at length in his reports, p. 538.

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the basis of our law on this subject. In that case a commission to examine witnesses in the East Indies having been issued by the Court of Chancery, the commissioners certified that they had examined several persons professing the Gentoo religion, whose evidence was delivered on oath taken in the usual and most solemn form in which oaths were most usually administered to witnesses who profess that religion, and in the same manner in which oaths were usually administered to such witnesses in the courts of justice erected at Calcutta by letters patent. On account of its importance, Lord Chancellor Hardwicke was assisted at the hearing of the cause by Lee, C. J., Willes, C. J., and Parker, C. B.; when on its being proposed to read as evidence the deposition of one of those persons, the defendants' counsel objected that, in order to render a person a competent witness, he must be sworn in the usual way upon the evangelists, and that the law of England recognized no other form of oath. The case having been learnedly argued on both sides, and the authorities fully gone into, each of the judges delivered an able and elaborate judgment; in which they showed clearly that oaths are not peculiar to the Christian religion, having been in constant use, not only in the ancient world, but among men in every age; that the substance of an oath is essentially the same in all cases; namely, an invocation of a Superior Power to attest the veracity of a statement made by a party, acknowledging his readiness to avenge falsehood, and in some cases invoking that vengeance; consequently that the mode of swearing is not the material part of the oath, and ought to be adjusted to suit the conscience of the witness. They, however, agreed that infidels who do not believe a God or a state of rewards and punishments cannot be admitted as witnesses: and although from some of the language in that case, and in other books, it might be supposed that a belief on the part of the witness in *a*

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future state of reward and punishment is required, the better opinion is, that belief in an Avenger of Falsehood generally is the only thing needful, the time and place of punishment being mere matter of circumstance (*a*).

§ 136. The principles laid down in *Omychund* v. *Barker* have not only been fully adopted into our law and practice (*b*), but appear to be recognized by the stat. 1 & 2 Vict. c. 105; which enacts, that "in all cases in which an oath may lawfully be and shall have been administered to any person, either as a juryman or a witness, or a deponent in any proceeding, civil or criminal, in any court of law or equity in the United Kingdom, or on appointment to any office or employment, or on any occasion whatever, such person is bound by the oath administered, provided the same shall have been administered in such form and with such ceremonies as such person may declare to be binding; and every such person, in case of wilful false swearing, may be convicted of the crime of perjury in the same manner as if the oath had been administered in the form and with the ceremonies most commonly adopted."

Rules of incompetency in the English law.

§ 137. Our common law rules of incompetency seem to have been copied from the civil law, which, however, carried the principle of exclusion much farther: and, indeed, our ancestors probably saw, what is obvious enough in itself, that although an extended prohibition

(*a*) Tayl. Evid. § 1252, 4th Ed.; Rosc. Cr. Evid. 121, 122, 5th Ed.; 1 Greenl. Ev. § 328, 7th Ed. For the discrepancy in the American authorities on this subject, see Appleton on Evidence, 22, 23, 269, 270; and Taylor in loc. cit. note (1). See further on the subject of oaths, Introd. §§ 56 *et seq.*

(*b*) *Maden* v. *Catanach*, 7 H. & N. 360; Peake's Ev. 141, 5th Ed.; Ph. & Am. Ev. 8 *et seq.*; 1 Greenl. Ev. § 328, 7th Ed.; Judgments of the Barons of the Exchequer in *Miller* v. *Salomons*, 7 Exch. 475; affir. on error, 8 Exch. 778.

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of suspected evidence may be valuable under a system where all questions of law and fact are decided by a single judge, it is misplaced in a country where the tribunal has the aid of a jury, acting either as judges of fact as at the present day, or as witnesses as in former times (*c*). So soon therefore as the modern law of evidence began to assume its present form, i. e. in the latter half of the seventeenth and beginning of the eighteenth centuries, the attention of our judges and lawyers naturally became much turned to this question: when the advancing opinions of the age, the then fully recognized principle that the jury are not witnesses, but are judges of the facts in dispute (*d*), and the hopelessness of attempting to reconcile the chaos of decisions in the old books on the incompetency of witnesses, shewed the imperative necessity of recasting the system. We have already seen how the law respecting oaths was settled by the case of *Omychund* v. *Barker*, in 1745 (*e*), and with respect to another very important branch of the subject,—the incompetency of witnesses on the ground of *interest*,—the Court of Queen's Bench in Lord Kenyon's time laid down as a clear and certain rule for the future, that, in order to render a witness incompetent on that ground, it must appear *either* that he was directly interested in the event of the suit; *or* that he could avail himself of the verdict in the cause, so as to give it in evidence on some future occasion in support of his own interest (*f*).

Incompetency from interest.

§ 138. This rule having become pure matter of legal history, it would be useless to refer to the numerous cases illustrative of its extent and meaning which are to be found in the books. It will be sufficient to state a

(*c*) See bk. 1, pt. 2, § 119.
(*d*) *Id.*
(*e*) *Suprà*, § 135.
(*f*) *Bent* v. *Baker*, 3 T. R. 27; *Smith* v. *Prager*, 7 T. R. 60. See also *R.* v. *Boston*, 4 East, 572; and *Doe* d. *Lord Teynham* v. *Tyler*, 6 Bingh. 390.

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few general principles. First, the rule drew a distinction between an interest in the *question* and interest in the *event of the suit.* However strong a witness's bias on the subject of the suit, or his hopes of obtaining some benefit from the result of the trial, might be, these formed no objection to his competency unless he had a direct interest in its *event.* Thus, if two actions were brought against two persons for the same assault, in the action against one the other would be a competent witness, because he was not interested in the *event.* So, where an action was brought against an underwriter on a policy of insurance, another underwriter on the same policy was held a competent witness for the defendant, for the same reason (*g*). Again, the interest, to disqualify, must have been a certain interest, and a legal existing interest. If it existed merely in the imagination, or belief, or expectation of the witness, he would not be incompetent, however strongly the objection might be urged against his credibility (*h*). But no matter how small and inconsiderable the amount of the legal interest might have been, the witness was incompetent (*i*). Where, however, a witness was incompetent on the ground of interest, the incompetency might be removed by a release from liability; and such releases were very common in practice.

§ 139. As the law of evidence continued to improve, the subject of interested witnesses continued to attract more and more attention. The rule laid down in *Bent* v. *Baker* and the other cases which have been cited, was indeed well defined, and on the whole as good as any that could be devised on such a subject; but the inconsistency of its application, and its inefficiency even in its professed object of obtaining unsuspected evidence, were obvious. It is impossible to calculate, by

(*g*) *Bent* v. *Baker*, 3 T. R. 27.
(*h*) Ph. & Am. Ev. 81.
(*i*) Ph. & Am. Ev. 92.

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any rule laid down *à priori*, the influence which interest in a given cause or in the event of a given suit will exercise on the mind of a given individual. On some minds a very slight interest would act sufficiently to induce perjury, on others very great interests would be powerless. Again, it being equally impossible to detect the numberless ways in which parties may be directly or indirectly interested in a particular event, the rule of exclusion was restricted to the case of *legal* interest in the event of the suit; the consequence of which was, that parties were often competent to give evidence who were swayed by the strongest *moral* interests to pervert the truth. Thus the heir apparent to an estate, however large, was a competent witness for his ancestor in possession, on an ejectment brought by a stranger claiming the property; while in an ejectment against a tenant for life, a remainder man having a legal interest to the amount of the smallest coin in the realm was not competent to give evidence for the defendant (*j*). We have already alluded to the cases of separate actions against several persons for the same assault, and of an action against one of several underwriters (*k*). And though last not least—in the very teeth of the maxims, "nemo in propriâ causâ testis esse debet" (*l*), and "repellitur à sacramento infamis" (*m*), any man might (and still may) in legal strictness be convicted, even of a capital offence, on the unsupported evidence of a person avowing himself an accomplice in his crime (*n*); who is taken out of gaol to bear testimony against his alleged companion, who gives that testimony under an *implied* promise of

(*j*) 1 Ph. & Am. Ev. 91 *et seq.*

(*k*) *Suprà*, § 138.

(*l*) 1 Blackst. Comm. 443; 3 *Id.* 371.

(*m*) Co. Litt. 158 a; Willes, 667.

(*n*) *R.* v. *Boyes*, 1 B. & S. 311; *R.* v. *Stubbs*, 1 Dearsl. 555; *R.* v. *Attwood*, 1 Leach, C. L. 464, and 466, note; *R.* v. *Durham*, *Id.* 478; *R.* v. *Jones*, 2 Campb. 132; 28 Ho. St. Tr. 487, 488; 31 *Id* 315; *R.* v. *Hastings*, 7 C. & P. 152; *R.* v. *Wilkes*, *Id.* 273; *R.* v. *Sheehan*, Jebb, Cr. C. 54.

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pardon; and who, being on his own confession liable to execution if the government should be dissatisfied with his conduct in this respect, may be said to be giving it with a rope round his neck, and thus influenced by the strongest of all earthly motives to procure the condemnation of the accused. In short, it at length became visible that interest should be an objection to the *credit*, not to the *competency* of a witness; but the law and practice were too firmly settled to be altered without the aid of the legislature.

§ 140. Without stopping to refer to various statutes, passed from time to time, by which interested parties and witnesses were rendered competent in particular cases, we will proceed to the first *general* enactment on the subject, the 3 & 4 Will. 4, c. 42, ss. 26 and 27, which enacted, that if a witness should be objected to as incompetent, on the ground that the verdict or judgment in the action on which it was proposed to examine him would be admissible in evidence for or against him, such witness should nevertheless be examined; but a verdict or judgment in that action in favour of the party on whose behalf he should have been examined, should not be admissible in evidence for him or any one claiming under him, nor should a verdict or judgment against the party on whose behalf he should have been examined, be admissible in evidence against him or any one claiming under him; and that the name of every witness objected to as incompetent on the above ground, should be indorsed on the record or document on which the trial should be had, together with the name of the party on whose behalf he was examined, and entered on the record of the judgment; and such indorsement or entry should be sufficient evidence that such witness was examined, in any subsequent proceeding in which the verdict or judgment should be offered in evidence.

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§ 141. This statute, at best but a palliative of the evil, was virtually repealed by the 6 & 7 Vict. c. 85. But before stating its provisions, we must advert to another ground of incompetency which has been altogether abolished by it, viz. *infamy of character;* respecting which, as also the ways in which the disability could be removed, much is to be found in the books. The objections to incompetency on the ground of interest apply here with at least equal force. The principle of the exclusion seems to have varied in different cases. In some—as where the witness had been convicted of perjury, forgery, and the like—it rested, in part at least, on the notion that his testimony was likely to prove mendacious: but the wide range of the rule clearly shews that this form of incompetency, like that for disfavoured religious opinions, was occasionally imposed as a punishment, in order that by refusing to allow the witness to give evidence in a court of justice he might be rendered a marked person in society. And this seems supported by the circumstance that at common law a pardon, even for perjury, restored the competency of the witness and made him a new man (*o*). But, whatever the reason, "repellitur à sacramento infamis" (*p*) was the rule of law; and in determining what offences should be deemed infamous, an artificial distinction was taken which caused the whole system to work very unevenly. We allude to the distinction between the "infamia juris" and the "infamia facti,"—between the infamy of an offence viewed in itself and that arbitrarily attributed to it by law (*q*),—it being a principle that some offences, although "minoris culpæ,"

Incompetency from infamy of character.

(*o*) We say *at common law;* for it was otherwise on a conviction of perjury under the 5 Eliz. c. 9, made perpetual by 21 Jac. 1, c. 28, s. 8. The difference is, that in the former case the disqualification only followed as a consequence from the judgment; whereas in the latter it was by the statute made part of the punishment. See this subject fully investigated in 2 Hargrave's Jurid. Argum. 221.

(*p*) Co. Litt. 158 a; Willes, 667.

(*q*) Ph. & Am. Ev. 14.

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were "majoris infamiæ" (*r*). It would be loss of time to enumerate with nicety the offences which were deemed infamous by law; it will be sufficient to say that treason and felony stood at their head, though an exception was created by 31 Geo. 3, c. 35, in favour of petty larceny, before the distinction between it and grand larceny was abolished (*s*). A conviction for misdemeanor did not in general render a witness incompetent; but to this there was the general exception of offences coming under the description of the crimen falsi—such as forgery, perjury, subornation of perjury, various forms of conspiracy, and the like (*t*). Still every crime involving falsehood or fraud had not this effect.

§ 142. In all cases the incompetency was created, not by the conviction, for that might have been quashed on motion in arrest of judgment (*u*), but by the judgment of the court pronounced against the offender, and which must have been proved in the usual way (*x*)—the maxim being "ex delicto non ex supplicio emergit infamia" (*y*). Incompetency on the ground of infamy was removable of course by reversal of the judgment, and, in general, by pardon (*z*), or by having undergone the punishment awarded for the offence (*a*).

Alterations effected by 6 & 7 Vict. c. 85.

§ 143. The next statute on the present subject was, as has been stated, 6 & 7 Vict. c. 85. After reciting that the inquiry after truth in courts of justice was often obstructed by incapacities created by the then existing law, and it was desirable that full information as to the facts in issue, both in criminal and in civil cases, should be laid before the persons appointed to decide upon

(*r*) Co. Litt. 6 b.
(*s*) Ph. & Am. Ev. 17.
(*t*) *Id.*
(*u*) *Id.* 20.
(*x*) *Id.* 19, 20.
(*y*) Ph. & Am. Ev. 18.
(*z*) § 141.
(*a*) *Pendock* d. *Mackinder* v. *Mackinder*, Willes, 665.

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them, and that such persons should exercise their judgment on the credit of the witnesses adduced and on the truth of their testimony: it enacted as follows, "No person offered as a witness shall hereafter be excluded by reason of incapacity from crime or interest from giving evidence, either in person or by deposition, according to the practice of the court, on the trial of any issue joined, or of any matter or question or on any inquiry arising in any suit, action, or proceeding, civil or criminal, in any court, or before any judge, jury, sheriff, coroner, magistrate, officer, or person, having, by law or by consent of parties, authority to hear, receive, and examine evidence; but every person so offered may and shall be admitted to give evidence on oath, or solemn affirmation in those cases wherein affirmation is by law receivable, notwithstanding that such person may or shall have an interest in the matter in question, or in the event of the trial of any issue, matter, question or injury (*b*), or of the suit, action, or proceeding in which he is offered as a witness, and notwithstanding that such person offered as a witness may have been previously convicted of any crime or offence: Provided that this act shall not render competent any party to any suit, action, or proceeding individually named in the record, or any lessor of the plaintiff, or tenant of premises sought to be recovered in ejectment, or the landlord or other person in whose right any defendant in replevin may make cognizance, or any person in whose immediate and individual behalf any action may be brought or defended, either wholly or in part, or the husband or wife of such persons respectively." Then followed two other provisoes, namely, that the Wills Act, 7 Will. 4 & 1 Vict. c. 26, should not be affected by the statute; and that in courts of equity a defendant might be examined as a witness on the behalf of the

(*b*) *Sic.*

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plaintiff or of any co-defendant, saving just exceptions; and any interest which such defendant so to be examined might have in the matters or in any of the matters in question in the cause, should not be deemed a just exception to the testimony of such defendant, but should only be considered as affecting or tending to affect the credit of such defendant as a witness. The first of the above three provisoes is repealed, so far as relates to parties to civil proceedings, by the 14 & 15 Vict. c. 99, s. 1, and with respect to their husbands and wives by 16 & 17 Vict. c. 83, s. 4 (*c*).

Expediency of rejecting witnesses as incompetent.

§ 144. Not only is the inclination of our modern judges and lawgivers in favour of receiving the evidence of witnesses, leaving its value to be estimated by the jury, but the propriety of expunging from our jurisprudence the title "Incompetency of witnesses" has been strongly and ably advocated, as well as candidly and temperately defended (*d*). For reasons stated in the Introduction to this work (*e*), it seems that, for general purposes at least, the principle of incompetency ought to be confined to *pre-appointed*, as contradistinguished from *casual* evidence; and the legislature has of late years inclined to this view. While, on the one hand, it has almost abolished the rules rejecting casual witnesses as incompetent, it has, on the other, interposed with regulations requiring certain important pieces of pre-appointed evidence to be attested in some particular way. Thus, the 6 & 7 Vict. c. 85, which, as we have seen, removes all objections to competency on the ground of interest in most cases, and of infamy in all, contains an express proviso, that nothing in it shall repeal the Wills Act, 7 Will. 4 & 1 Vict. c. 26, by which, (explained by 15 & 16 Vict. c. 24,) all wills must be in writing and attested by two or more witnesses; and the 15th section enacts that if

(*c*) See those statutes, *infrà*.

(*d*) Introd. pt. 2, § 62.

(*e*) *Id.*

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a will contains any beneficial devise, legacy, gift, &c., to an attesting witness, it shall be void, in order that he may be competent to prove the execution of the will. And the 32 & 33 Vict. c. 62, s. 24, requires that all cognovits and warrants of attorney to confess judgment shall be subscribed by an attorney, acting on behalf of the party by whom they are executed, and expressly named by him.

Grounds of incompetency still existing in our law.

§ 145. We now proceed to consider more in detail the three grounds of incompentcy which still exist in our law, namely, 1°. Incompetency from want of reason and understanding; 2°. Incompetency from want of religion; and 3°. Incompetency from interest.

1°. Incompetency from want of reason and understanding. 1. Deficiency of intellect.

§ 146. 1°. Incompetency from want of reason and understanding. The causes of this incompetency are twofold;—*Deficiency* of intellect; and *Immaturity* of intellect. The objection on the first of these grounds rarely presents itself to the *competency* of a witness, and if the defect appears in the course of his examination it is usually made matter of comment to the jury.

§ 147. Our books lay down generally that persons of "non-sane memory," and who have not the use of reason, are excluded from giving evidence (*f*); but they are not quite agreed as to the reason of this—some basing it on the ground that such persons are insensible to the obligation of an oath (*g*); while others, with more justice, say it is because all persons who are examined as witnesses must be fully possessed of their understanding,—that is, of such an understanding as enables them to retain in memory the events of which they have been witnesses, and gives them a knowledge of right and

(*f*) Com. Dig. Testmoigne, A. 1; Co. Litt. 6 b; Ph. & Am. Ev. 4; Peake, Ev. 122, 5th Ed.

(*g*) 1 Greenl. Ev. § 365, 7th Ed.; Tayl. Ev. § 1247, 4th Ed.

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wrong (*h*). Probably both reasons have had their influence (*i*). According to the Roman law, "Furiosus absentis loco est" (*j*).

§ 148. But who are thus excluded? What is the extent of the rule? A man of "non-sane memory" is defined by Littleton "qui non est compos mentis" (*k*). This is corroborated by Sir E. Coke in his Commentary (*l*), who adds, "Many times, as here it appeareth, the Latin word explaineth the true sense, and (Littleton) calleth him not *amens, demens, furiosus, lunaticus, fatuus, stultus,* or the like, for *non compos mentis* is most sure and legal." He then goes on, "Non compos mentis is of four sorts. 1. An idiot, which from his nativity, by a perpetual infirmity, is non compos mentis. 2. He that by sickness, grief, or other accident, wholly loses his memory and understanding. 3. A lunatic that hath sometime his understanding and sometime not, 'aliquando gaudet lucidis intervallis,' and therefore he is called 'non compos mentis' so long as he hath not understanding. 4. Lastly, he that by his own vicious act for a time depriveth himself of his memory and understanding, as he that is drunken." A similar classification is adopted in modern works on evidence (*m*). These four sorts of persons are incompetent witnesses until the cause of incompetency is removed. Thus, although a person deaf and dumb from birth is presumed by law to be an idiot (*n*), yet if he can be communicated with either by signs and tokens (*o*), or by writing (*p*), and it appears that he is possessed of intelligence, and

(*h*) Peake's Ev. 122, 5th Ed.
(*i*) Ph. & Am. Ev. 4.
(*j*) Dig. lib. 50, tit. 17, l. 124, § 1. See also 4 Co. 125 b, 126 a.
(*k*) Litt. sect. 405.
(*l*) Co. Litt. 246 b.
(*m*) Ph. & Am. Ev. 4; 1 Greenl. Ev. § 365, 7th Ed.
(*n*) 1 Hale, P. C. 34.
(*o*) 1 Phill. Ev. 7, 10th Ed; *R.* v. *Ruston*, 1 Leach, C. L. 408; *R.* v. *Steel*, *Id.* 452.
(*p*) 1 Ph. Ev. 7, 10th Ed.; *Morrison* v. *Lennard*, 3 C. & P. 127.

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understands the nature of an oath, he may be examined as a witness. In one case, where it appeared that such a person could write, Best, C. J., doubted whether he ought not to be compelled to give his evidence in that way, and not by signs (*q*); but it would be difficult to maintain this as a proposition of law, even supposing it to hold good as a principle of convenience. Neither of these modes of giving evidence is derivative from or secondary to the other; besides which, a deaf and dumb witness might be very expert in making and understanding signs, and yet express his thoughts very indifferently in writing. In a much more recent case, before Lord Campbell, which was an action for seduction, the seduced party was deaf and dumb, but could write very well, and two letters written by her to the defendant were put in evidence. Her examination in court, however, was chiefly carried on by signs, and, occasionally, when these were not understood, by writing (*r*). So a lunatic while in a lucid interval is a competent witness (*s*): but whether the evidence of a monomaniac, *i. e.* a person insane on only one subject, can be received on matters not connected with his delusion, was unsettled until recently; and some text writers thought it the safest rule to exclude the testimony of such persons, it being impossible to calculate with accuracy the extent and influence of such a state of mind (*t*). This would be hard measure. A monomaniac may perfectly understand the nature and obligation of an oath; his general intellect may equal or surpass that of his interrogators, and indeed he seems much in the condition of a lunatic who is in a perpetual lucid state on all subjects save one. A medical man, eminent in the treatment of the insane, deposed in our presence, in a court of justice, that while

(*q*) *Morrison* v. *Lennard*, 3 C. & P. 127.

(*r*) *Bartholomew* v. *George*, Kent Sp. Ass. 1851, MS.

(*s*) Com. Dig. Testmoigne, A. 1; Ph. & Am. Ev. 5.

(*t*) Roscoe, Crim. Ev. 123, 4th Ed. by Power.

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he was physician to a large lunatic establishment, some alterations were required in the building, and that the best plans for the purpose, and those which were ultimately adopted, were sent in by one of the insane patients. In Ray's Medical Jurisprudence of Insanity (*u*), is mentioned a case tried before the Supreme Court for the county of Lincoln in Maine, America, in May, 1833, in which a witness was produced who was perfectly sane and satisfactory in his evidence on all points, except that he believed himself to be an inspired apostle. And on an application to the Court of Exchequer for a habeas corpus ad testificandum, to bring up the body of a person confined as a lunatic; Parke, B., said, "If you make an affidavit that he is not a dangerous lunatic, and that he is in a fit state to be brought up, the habeas corpus should be granted" (*x*).

§ 149. This question seems now set at rest by the case of *R.* v. *Hill* (*y*), decided by the Court of Criminal Appeal. The accused, who was attendant of a ward in a lunatic asylum, was indicted for the manslaughter of one of the patients under his care. At the trial before Coleridge and Cresswell, JJ., at the Central Criminal Court, it being opened by the prosecution that a witness of the name of Donelly would be called, who was a patient in the same ward with the deceased, evidence was gone into on both sides in order to found and meet the objection to his competency. A witness stated that Donelly laboured under the delusion that he had a number of spirits about him continually talking to him; but that that was his only delusion: and two medical witnesses deposed that he was rational on all points not connected with it, while one added, that he was quite capable of giving an account of any transaction that

(*u*) § 304. *Case of Jacob Schwartz.*

(*x*) *Fennell* v. *Tait*, 1 C. M. & R. 584.

(*y*) 2 Den. & P. C. C. 254.

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happened before his eyes. Donelly was then called, and before being sworn was examined by the prisoner's counsel. He said, "I am fully aware that I have a spirit, and 20,000 of them; they are not all mine; I must inquire—I can where I am; I know which are mine. Those ascend from my stomach to my head, and also those in my ears; I do not know how many they are. The flesh creates spirits by the palpitation of the nerves and the 'rheumatics;' all are now in my body and round my head; they speak to me incessantly—particularly at night. That spirits are immortal I am taught by my religion from my childhood, no matter how faith goes: all live after my death, those that belong to me and those which do not; Satan lives after my death, so does the Living God." After more of this kind, he added, "They speak to me constantly; *they are now speaking to me;* they are not separate from me; they are round me, speaking to me now; but I can't be a spirit, for I am flesh and blood; they can go in and go out through walls and places which I cannot. I go to the grave, they live hereafter—unless, indeed, I have a gift different from my father and mother that I do not know. After death my spirit will ascend to Heaven, or remain in purgatory. I can prove purgatory. I am a Roman Catholic; I attended Moorfields, Chelsea chapel, and many other chapels round London. I believe purgatory; I was taught that in my childhood and infancy. I know what it is to take an oath; my catechism taught me from my infancy when it is lawful to swear; it is when God's honour, our own or our neighbour's good require it. When man swears, he does it in justifying his neighbour on a Prayer-book or obligation. My ability evades while I am speaking, for the spirit ascends to my head. When I swear, I appeal to the Almighty; it is perjury the breaking a lawful oath or taking an unlawful one; he that does it will go to hell for all eternity." He was

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then sworn, and, says the report, *gave a perfectly connected and rational account of a transaction which he reported himself to have witnessed.* He was in some doubt as to the day of the week on which it took place, and on cross-examination said, "These creatures insist upon it it was Tuesday night, and I think it was Monday;" whereupon he was asked, "Is what you have told us what the spirits told you, or *what you recollect without the spirits?*" and he said, "No; *the spirits assist me in speaking of the date;* I thought it was Monday, and they told me it was Christmas Eve—Tuesday; but I was an eye witness, an ocular witness, &c." The court received his evidence, reserving the question of his competency for the Court of Criminal Appeal. The accused having been convicted, the case was argued before Lord Campbell, C. J., Coleridge and Talfourd, JJ., and Alderson and Platt, BB.; when the counsel for the prisoner contended, that Donelly was non compos mentis, and a lunatic within the legal definition of that term, and that as soon as any unsoundness of mind is manifested in a witness he ought to be rejected as incompetent, citing, inter al., Com. Dig. Testmoigne, A 1. The court, however, without hearing counsel on the other side, unanimously upheld the conviction. Lord Campbell, in delivering his judgment, said, "The question is important, and has not yet been solemnly decided after argument. But I have no doubt that the rule was properly laid down by Parke, B., in the case that was tried before him, and that it is for the judge to say whether the insane person has the sense of religion in his mind, and whether he understands the nature and sanction of an oath; and then the jury are to decide on the credibility and weight of his evidence. As to the authorities that have been cited, the question is, in what sense the term '*non compos*' was there used. A man may, in one sense, be *non compos*, and yet be aware of the nature and sanction

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of an oath. In the particular case before the court, I think that the judge was right in admitting the witness; I should have certainly done so myself. * * * It has been argued that any particular delusion, commonly called monomania, makes a man inadmissible. This would be extremely inconvenient in many cases in the proof either of guilt or innocence: it might also cause serious difficulties in the management of lunatic asylums. I am, therefore, of opinion that the judge must, in all such cases, determine the competency, and the jury the credibility. Before he is sworn, the insane person may be cross-examined, and witnesses called to prove circumstances which might show him to be inadmissible; but, in the absence of such proof, he is *primâ facie* admissible, and the jury must attach what weight they think fit to his testimony." Talfourd, J., observing, " It would be very disastrous if mere delusions were held to exclude a witness. Some of the greatest and wisest of mankind have had particular delusions; "—Lord Campbell added, " The rule which has been contended for would have excluded the testimony of Socrates, for he had one spirit always prompting him " (*y*).

§ 150. But while our books point out the various causes of mental alienation which disqualify from giving evidence, they say little or nothing as to the intensity of it required for this purpose. In truth there are two, if not more, distinct standards of mental alienation known to the law. First, that which is sufficient to exculpate from a criminal charge: and here it is settled that ordinary lesion of intellect is not sufficient—there must be such an absence of intellect that the accused, when he did the act, was unconscious that he was committing a crime prohibited by law (*z*). 2nd. The degree of in-

(*y*) See *Waring* v. *Waring*, 6 Mo. P. C. C. 341.

(*z*) Answer of the judges to the House of Lords, 8 Scott, N. R.

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sanity which will support a commission of lunacy. In the time of Lord Eldon the Court of Chancery assumed, perhaps usurped, the jurisdiction of issuing commissions of lunacy against "persons of unsound mind," *i. e.*, persons in a state contradistinguished from idiocy and lunacy,—a state of mental imbecility and incapacity to manage their affairs (*a*). 3rd. The degree of unsoundness of mind which will avoid contracts, deeds, wills, and the like, seems to hold an intermediate place between these (*b*). Calm reflection will convince that if mental alienation is to be retained in our law as a ground of incompetency, it should be restricted to cases where it is found impossible to communicate with the witness, so as to make him understand that he is in a court of justice and expected to speak the truth. Any eccentricities or aberrations which fall short of this are surely only matter of comment to the jury, on the reliance to be placed on his testimony. And here it is important to observe once for all, that when reading what our old lawyers have written on the subject of insanity, we should never forget how little the subject was understood in their days, and the shocking mistakes in the treatment of the insane which then prevailed. As some one has observed, "their notions of insanity were founded on observation of those wretched inmates of the madhouse whom stripes and chains, cold and filth, had degraded to the stupidity of an idiot, or exasperated to the fury of a demon." Now the researches of modern physiologists have shewn, that madness is not an infliction sent direct from Heaven, but a bodily disease, which may often be completely cured; and that there are many inferior forms of diseased or disordered mind and imagina-

595; 1 Car. & K. 130; *R.* v. *Higginson, Id.* 129; *R.* v. *Vaughan*, 1 Cox, Cr. Ca. 80.

(*a*) Shelford on Lunacy, pp. 5, 104, 2nd Ed.

(*b*) See *Smith* v. *Tebbitt*, L. R., 1 P. & D. 398; *Bridgeman* v. *Green*, Wilmot's Notes, 58; *Blackford* v. *Christian*, 1 Knapp, P. C. C. 73, 78.

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tion, which influence the conduct of persons who are, in other respects, perfectly capable of taking care of themselves and transacting the ordinary business of life (*c*). Some even go so far as to assert that there exists a form of the disease, to which they have given the name of "moral insanity," in which no *delusion* of any kind exists; but the patient's moral character is revolutionized, and he is hurried against his will by some uncontrollable impulse, into the commission of acts of violence and crime (*d*). Although this state of mind is not recognized in our jurisprudence, and its existence as matter of fact is extremely questionable, still the above discoveries shew how arbitrary and imperfect any line drawn by law on such a subject as the present must necessarily be; and, as an eminent modern writer well expresses it, "The subtile and shifting transformations of wild passion into maniacal disease, the returns of the maniac to the scarcely more healthy state of stupid anger, and the character to be given to acts done by him when near the varying frontier which separates lunacy from malignity, are matters which have defied all the sagacity and experience of the world" (*e*).

Immaturity of intellect—Testimony of children.

§ 151. Next, with respect to the evidence of children. *Immaturity* of intellect is of course a ground of incompetency as much as natural defect or subsequent depri-

(*c*) Viewing the subject in a physiological light, Dr. Beck, in his Medical Jurisp. ch. 13, 7th Ed., enumerates the following forms of mental alienation:—1. Mania; 2. Monomania (including melancholy); 3. Dementia; 4. Incoherent madness (holding a sort of middle place between mania and dementia); 5. Congenital idiotism; besides various subdivisions. He also (p. 487 *et seq.*) mentions some forms of disease, which, either in a partial or temporary manner, bear a strong resemblance to insanity. These are the delirium of fever, hypochondriasis, hallucination, epilepsy, nostalgia, delirium tremens, &c.

(*d*) Beck's Med. Jurisp. 436, 477, 7th Ed.; Dr. F. Winslow, in the Papers of the Juridical Society, vol. 1, p. 595; &c.

(*e*) Sir J. Mackintosh's Hist. Engl. vol. 3, p. 36.

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vation of it. But there is another difficulty in dealing with this subject, namely, that while the intellect of a child may be sufficiently developed, to enable him to give an intelligible account of what he has seen or heard, he may not have been taught the nature and obligation of an oath; and although in the case of an adult witness the want of early religious education may have been supplied by experience or reflection, it would be idle to look for these in a person of tender years. For these reasons the testimony of children has always been a source of embarrassment to tribunals, and the laws of many nations cut, instead of attempting to unravel, the knot, by arbitrarily rejecting such testimony when the child is under a definite age (*f*)—a course objectionable on many grounds; and principally as it all but proclaims impunity to certain offences of a serious nature against the persons of children, which it is next to impossible to establish without receiving their account of what has taken place.

(*f*) The general rule of the civilians, subject however to several exceptions, was, that persons under the age of puberty were incompetent to give evidence (Huberus, Præl. Jur. Civ. lib. 22, tit. 5, n. 2, iv.; Mascard. de Prob. Concl. 1253; 1 Ev. Poth. § 789). Some of their authorities say that minors under twenty years were rejected in criminal cases. Mascard. de Prob. Concl. 1320, N. 9 *et seq.;* and 1253, N. 14. This rule appears to have been based on the language of the Digest; lib. 50, tit. 17, l. 2, § 1,—"Impubes omnibus officiis civilibus debet abstinere;" but more particularly on lib. 22, tit. 5, l. 3, § 5,—"Lege Julia de vi cavetur, ne hac lege in reum testimonium dicere liceret, qui se ab eo, parenteve ejus liberaverit: quive impuberes erunt, &c."—rather a frail foundation for the position that the jurisprudence of ancient Rome rejected the testimony of minors *in general;* for the law just quoted only does so on certain capital charges of public violence. Expressio unius est exclusio alterius; and we have the positive testimony of Quintilian, that in his time the evidence even of very young children was occasionally received, or at least not rejected as matter of course. See Inst. Orat. lib. 5, c. 7, *ver. fin.;* and Pothier *in loc. cit.* The Hindu law seems to have rejected the evidence of minors under fifteen,—an age in that climate corresponding probably to twenty or more in ours. Translation of Pootee, c. 3, sect. 8, in Halhed's Code of Gento Laws.

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Besides, children of the same age differ so immensely in their powers of observation and memory that no fixed rule, even approximating to the truth, can be laid down. In this case at least it may truly be said, "Nature makes her mock of those systems of tactics, which human industry presents as leading-strings to human weakness" (*g*).

§ 152. As to the old law on this subject. Our ancestors adopted the maxim "minor jurare non potest" (*h*), but with some exceptions—at the age of twelve years, for instance, an infant might be called on to take the oath of allegiance, &c. (*i*). And although, as will be shewn presently, the evidence of children was often rejected, it was not solely on the ground of their supposed incapacity to take an oath; for a difficulty was likewise felt in fixing the age at which they should be held responsible to the criminal law,—a matter now fully settled thus, that for this purpose fourteen is, with some few exceptions, full age; that between seven and fourteen an infant is presumed to be doli incapax, but may be shewn to be otherwise; but that under seven there is, (whether rightly or not), a præsumptio juris et de jure that he cannot have a mischievous discretion (*j*). Old law.

§ 153. Sir Edward Coke in his 1st Institute (*k*) states broadly that a person "not of discretion" cannot be a witness; and in another part of the same work (*l*), he defines the age of discretion to be fourteen years. More than half a century later, Sir Matthew Hale in his Pleas of the Crown (*m*) lays down the law thus—"Regularly an infant under fourteen years is not to be Gradual changes in it.

(*g*) 3 Benth. Jnd. Ev. 304.
(*h*) Co. Litt. 172 b.
(*i*) Co. Litt. 68 b, 78 b, 172 b.
(*j*) 4 Blackst. Comm. 22, 23; 1 Hale, P. C. 20 *et seq.*; and *infrà*, bk. 3, pt. 2, ch. 2.
(*k*) Co. Litt. 6 b.
(*l*) Co. Litt. 247 b.
(*m*) 1 Hale, P. C. 302; see also *Id.* 634; and 2 *Id.* 279.

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examined upon his oath as a witness; but yet the condition of his person, as if he be intelligent, or the nature of the fact, may allow an examination of one under that age, as in case of witchcraft, an infant of nine years old has been allowed a witness against his own mother. And the like may be in a rape of one under ten years upon the stat. of 18 Eliz. c. 6. And the like hath been done in case of buggery upon a boy upon the stat. 25 Hen. 8, c. 6. And surely in some cases one under the age of fourteen years, if otherwise of a competent discretion, may be a witness in case of treason." In another place, however (*n*), after telling us that instances have been given of very young witnesses sworn in capital causes, viz. one of nine years old, he adds, "Yet such very young people under twelve years old I have not known examined upon oath, but sometimes the court for their information have heard their testimony without oath, which possibly being fortified with concurrent evidences may be of some weight, as in cases of rape, buggery, witchcraft, and such crimes, which are practised upon children." In the case of *Young* v. *Slaughterford* (*o*), T. T. 1709, which was an appeal of murder, tried at bar, L. C. J. Holt held, that an infant under twelve years of age might be admitted as a witness if he knew the danger of an oath, and that appearing he was admitted. But in *R.* v. *Travers* (*p*), at the Kingston Spring assizes of 1726, which was an indictment for a rape on a child under the age of seven years, L. C. B. Gilbert rejected the evidence of the child, and the prisoner was acquitted. A fresh indictment was then found for assault with intent to ravish, which was tried before L. C. J. Raymond. The child had in the mean time attained the age of seven, and on its evidence being objected to, on the ground that a child six or seven years old ought for the purposes of testimony to be considered

(*n*) 2 Hale, P. C. 283—4.
(*o*) 11 Mod. 228.
(*p*) 1 Stra. 700.

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in the same light as a lunatic or madman, the counsel for the prosecution cited a case at the Old Bailey, in 1698, where C. B. Ward admitted the evidence of a child under ten, which had been examined as to the nature of an oath and given a reasonable account of it. The Lord Chief Justice, however, rejected the evidence, and cited the case of one Steward, who was tried at the Old Bailey in 1704, for rapes on two children; in the first of which the child was ten years old, and yet was not admitted as a witness before other evidence was given of strong circumstances as to the guilt of the defendant, and before the child had given a good account of the nature of an oath. The second was between six and seven, and it was unanimously agreed that a child so young could not be admitted to be an evidence, and its testimony was accordingly rejected without inquiring into any circumstances to give it credit. Although L. C. B. Gilbert rejected the evidence of the child in the first case of *R.* v. *Travers*, it was probably on the ground that the child was ignorant of the nature of an oath, or deficient in natural intelligence; for in his Treatise on Evidence (*q*) he lays down the rule thus—"Children under the age of fourteen are not regularly admitted as witnesses, and yet at twelve they are obliged to swear allegiance in the leet. There is no time fixed wherein they are to be excluded from evidence, but the reason and sense of their evidence is to appear from the questions propounded to them, and their answers to them." And, lastly, during the argument in the case of *Omychund* v. *Barker* (*r*), in 1744, we find L. C. J. Lee informing counsel, who was relying on the language of Sir Matthew Hale in one of the passages above referred to, that it had been determined at the Old Bailey, upon mature consideration, that a child should not be admitted as an evidence without

(*q*) Gilb. Ev. 144, 4th Ed. (*r*) 1 Atk. 29.

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oath; and L. C. B. Parker added, that it was so ruled at Kingston assizes before Lord Raymond.

Modern law.

§ 154. Through all this inconsistency and confusion we can trace two principles working their way. 1. That if the testimony of an infant of tender years is to be received at all, it ought to be received from the infant itself, and not through a statement presented *obstetricante manu*. 2. That a witness being an infant of tender years is no ground for relaxing the rule "In judicio non creditur nisi juratis" (*s*). At length, in 1779, both these received a solemn judicial recognition in *R.* v. *Brasier* (*t*), which is the leading case on the subject. The prisoner was indicted for an assault with intent to commit a rape on an infant under the age of seven years, who was not examined as a witness, and the chief evidence for the prosecution was the account she had given of the transaction to two other persons. The prisoner having been convicted, the case was considered by the judges, who decided that the conviction was wrong. They held *unanimously* that "no testimony whatever can be legally received except upon oath; and that an infant, though under the age of seven years, may be sworn in a criminal prosecution, provided such infant appears, on strict examination by the court, to possess a sufficient knowledge of the nature and consequences of an oath, for there is no precise or fixed rule as to the time within which infants are excluded from giving evidence; but their admissibility depends upon the sense and reason they entertain of the danger and impiety of falsehood, which is to be collected from their

(*s*) Cro. Car. 64.

(*t*) 1 Leach, C. L. 199; 1 East, P. C. 443. It is to be remarked that a few years previous a similar opinion had been expressed by Gould, J., on an indictment for rape on an infant between six and seven years of age. The prisoner having been acquitted on the unsworn testimony of the child, the judge mentioned the matter to the other judges, a majority of whom agreed with him. *R.* v. *Powell*, 1 Leach's Crown Law, 110.

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answers to questions propounded to them by the court; but if they are found incompetent to take an oath, their testimony cannot be received."

§ 155. Brasier's case is the foundation of the modern law and practice relative to the admissibility of the testimony of children. As in the criminal law "malitia supplet ætatem" (*u*), so here we may say with the canonists "prudentia supplet ætatem" (*x*). Yet it appears that so late as 1808, on an indictment for a rape on a child of five years old, where the child was not examined, an account of what she had told her mother about three weeks after the transaction was received in evidence, and the prisoner convicted; but a case having been reserved, the judges, as might have been expected, thought the evidence clearly inadmissible, and he was pardoned (*y*). In a much more recent case (*z*), Alderson, B., said, "It certainly is not law that a child under seven cannot be examined as a witness. If he shews sufficient capacity on examination, a judge would allow him to be sworn." The judgment of Patteson, J., in *R.* v. *Williams* (*a*), raises an important question as to the nature of the capacity required on these occasions. That was an indictment for murder, and a female child of eight years was called as a witness. It appeared that up to the death of the deceased the child had never heard of God, or of a future state of rewards and punishments, never prayed, nor knew the nature of an oath; but that, since the death, she was visited by a clergyman twice, who had given her some instruction as to the nature and obligation of an oath; but she gave a very confused account of it, and had, says the report,

(*u*) Dy. 104 b; 1 Hale, P. C. 26; 4 Blackst. Comm. 23, and 212.

(*x*) Lancel. Inst. Jur. Can. lib. 2, tit. 10, § 5.

(*y*) *R.* v. *Tucker*, Ph. & Am. Ev. 6; 1 Ph. Ev. 10, 10th Ed.

(*z*) *R.* v. *Perkins*, 2 Moo. C. C. 139.

(*a*) 7 C. & P. 320.

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"no intelligence as to religion or a future state." Her testimony was objected to on the ground, that if it were sufficient that a witness should understand the nature of an oath merely from information recently communicated, a clergyman might always be called to instruct a witness on that subject when he came into the box to be examined on the trial. The counsel for the prosecution having cited *R.* v. *Wade*, 1 Moo. C. C. 86, Patteson, J., said, "I must be satisfied that this child feels the binding obligation of an oath from the general course of her religious education. The effect of the oath upon the conscience of the child should arise from religious feelings of a permanent nature, and not merely from instructions, confined to the nature of an oath, recently communicated to her for the purposes of this trial; and as it appears that, previous to the happening of the circumstances to which this witness comes to speak, she had had no religious education whatever, and had never heard of a future state, and now has no real understanding on the subject, I think that I must reject her testimony." There can be no doubt of the correctness of the decision in this case, nor that the circumstance that the child had been instructed in the nature of an oath after the offence was committed, is one for the judge to consider when called on to weigh its capacity to be sworn; but the dogma, if, indeed, Patteson, J., intended to lay it down, that the child must feel the binding obligation of an oath from the general course of its religious education previous to the injury done, is at variance with other authorities (*b*), and is indefensible on principle.

Examination of infants of tender years by the judge.

§ 156. When a material witness in a criminal case is an infant of tender years, the judge usually examines him, with the view of ascertaining whether he is aware

(*b*) See Tayl. Evid. § 1250, 5th Ed., and the cases there referred to. Also the cases cited *infrà*.

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of the nature and obligation of an oath and the consequences of perjury. What shall be considered tender years for this purpose does not appear to be defined, although, by analogy to the general law respecting infancy, the requisite degree of religious knowledge should be presumed at the age of fourteen. Still the court has a right to examine as to the religious knowledge even of an adult, if it suspects him deficient (*c*). And if it is ascertained *before the trial* that a material witness is of tender years and devoid of religious knowledge, the court will, *in its discretion*, postpone the trial, and direct that he shall in the meantime receive due instruction on the subject (*d*). But in a recent case, where a father was charged with violating his daughter, aged twelve, Alderson, B., refused to postpone the trial for the purpose of her being taught the nature of an oath; stating that all the judges were of opinion that it was an incorrect proceeding; that it was like preparing or getting up a witness for a particular purpose, and on that ground was very objectionable (*e*). If this be correctly reported, not only is it at variance with a series of previous authorities (*f*), but, as remarked in the text work where the case is found, "By the strict application of this rule, a parent, by neglecting his moral duty as to the education of his child, may thus obtain an immunity for the commission of a heinous crime" (*g*).

§ 157. On trials for homicide the general rule of law which rejects second-hand or hearsay evidence is relaxed, so far as to render admissible declarations of the deceased as to the cause of his death, provided they

Dying declarations of infants.

(*c*) See *infrà*.

(*d*) Stark. Ev. 117, 4th Ed.; 1 Phill. Ev. 9, 10th Ed.; Tayl. Ev. 1247, 5th Ed.; 1 Leach, C. L. 430, note (*a*); *R.* v. *Nicholas*, 2 Car. & K. 246; *R.* v. *Bayliss*, 4 Cox, Cr. Ca. 23.

(*e*) 1 Phill. Ev. 10, 10th Ed.

(*f*) See *suprà*, note (*d*).

(*g*) 1 Phill. Ev. 10, note (3), 10th Ed.

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were made by him at a time when he was under the conviction that death was impending (*h*). This exception has been allowed partly from necessity, partly on the ground that the situation of the party may fairly be taken, as conferring on what he says a religious sanction equal to that supplied by an oath, and partly that on such occasions witnesses rarely have any interest in deceiving. But as, when children of tender years are examined as witnesses, the court has the security of inquiring into their intelligence and religious knowledge, it seems to follow that their dying declarations are not *primâ facie* receivable where those of an adult would be: for the latter will be rejected if it appears that the deceased was a person who, through ignorance or any other cause, was not likely to be impressed with a religious sense of his approaching dissolution (*i*). In *R.* v. *Pike* (*j*), two prisoners were indicted for the murder of a child *four* years old. It was proposed to put in evidence a statement made to her mother by the child, shortly before her death, at a time when she thought she was dying, as to the manner in which she had been treated by the prisoners. Park, J. (with the concurrence of Parke, J.), rejected the statement, saying, "As this child was but four years old, it is quite impossible that she, however precocious her mind, could have had that idea of a future state which is necessary to make such a declaration admissible. * * * * Indeed I think that from her age we must take it that she could not possibly have had any idea of that kind." Without in the least questioning the propriety of the *decision* in this case, we may well doubt whether the above *dictum* can be supported. There certainly is no præsumptio juris et de jure on this subject; and however unlikely it may be that a child of four years old should have clear ideas respecting religion and divine

(*h*) See *infrà*, bk. 3, pt. 2, ch. 4. (*j*) 3 C. & P. 598.
(*i*) *Id.*

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punishment for falsehood, yet if that fact were shewn affirmatively, its dying declarations ought to be received. In *R.* v. *Perkins* (*k*), it was held by the judges on a point reserved, that the dying declarations of a child of *ten* years old were receivable under such circumstances. But the question still remains, at what age is the presumption of the absence of intelligence and of ignorance on religious subjects to cease, so as to render this affirmative proof unnecessary? Analogy points to fourteen years, but judicial decisions are silent.

Effect of the evidence of children.

§ 158. As to the effect of the evidence of children when received, "Independently of the sanction of an oath," says a text work (*l*), "the testimony of children, after they have been subjected to cross-examination, is often entitled to as much credit as that of grown persons; and what is wanted in the perfection of the intellectual faculties, is sometimes more than compensated by the absence of motives to deceive. It is clear that a person may be legally convicted upon such evidence alone and unsupported; and whether the account of the child requires to be corroborated in any part, or to what extent, is a question exclusively for the jury, to be determined by them on a review of all the circumstances of the case, and especially of the manner in which the evidence of the child has been given." Quintilian (*m*) reckons among doubtful proofs "parvulorum indicia; quos pars altera nihil fingere, altera nihil judicare dictura est." This must not, however, be taken too literally: some children indulge in habits of romancing, which often lead them to state as facts, circumstances having no existence but in their own imaginations; and the like consequence is not unfrequently induced in other children, by the suggestions or threats

(*k*) 2 Moo. C. C. 135.
(*l*) Ph. & Am. Ev. 7.
(*m*) Inst. Orat. lib. 5, c. 7, *vers. fin.*

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of grown-up persons acting on their fears and unformed judgments.

2°. Incompetency from want of religion.

§ 159. 2°. The next ground of incompetency may be styled "incompetency from want of religion." To the natural and moral sanctions of the truth of statements made by man to man, it has been usual in most, if not all, ages and countries to join the additional security of "An Oath;" i. e. a recognition by the speaker of the presence of an invisible Being superior to man, ready and willing to punish any deviation from truth, invoking that Being to attest the truth of what is uttered, and in some cases calling down his vengeance in the event of falsehood (*n*). On this principle courts of justice in most nations exact an oath as a condition precedent to the reception of evidence; and among us in particular, "In judicio non creditur nisi juratis" (*o*), has been a legal maxim from the earliest time. Hence it follows that the evidence of a witness must be rejected who either is ignorant of, or who denies the existence of such a superior power, or refuses to give the required security to the truth of his testimony; and the present source of incompetency may accordingly be divided into three heads: 1st, Want of religious knowledge; 2nd, Want of religious belief; and 3rd, Refusal to comply with religious forms.

Three forms of.

1. Want of religious knowledge.

§ 160. The first of these may be disposed of in a word; the exception arising principally in the case of children, whose competency has already been considered (*p*). But the same principles apply where an adult, deficient in the requisite religious knowledge, is offered as a witness (*q*).

(*n*) See as to Oaths, Introd. pt. 2, §§ 56 *et seq.*

(*o*) Cro. Car. 64.

(*p*) *Suprà*, §§ 151 *et seq.*

(*q*) *R.* v. *White*, 1 Leach, C. L. 430; *R.* v. *Wade*, 1 Moo. C. C. 86.

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§ 161. 2nd, Incompetency for want of religious belief. This has been in a great degree anticipated in a former part of this chapter (*r*), where we took occasion to show the injustice and absurdity of the old practice, of inflicting incompetency as a punishment for erroneous opinions, or even for misconduct not likely to affect the veracity of a witness. The history of our law on this subject was there traced—the gradual establishment of the great and sound principles that courts of justice are not schools of theology—that the object of the law in requiring an oath is to get at the truth relative to the matters in dispute, by obtaining a hold on the *conscience* of the witness—and consequently that every person is admissible to give evidence who believes in a Divine Being, the avenger of falsehood and perjury among men, and who consents to invoke by some binding ceremony the attestation of that Power to the truth of his deposition. But how is the state of mind of the proposed witness on these subjects to be ascertained? It is clear that disbelief in the existence and moral government of God are not to be presumed (*s*); if such exist they are psychological facts, and consequently incapable of proof except by the avowal of the party himself, or the presumption arising from circumstances (*t*). According to most of our text writers and the usual practice, the proper and regular mode of procedure is by examining the party himself (*u*); while some authorities go so far as to assert that this is the only mode (*v*). Professor Christian, on the other hand, informs us, that he "heard a learned judge declare at nisi prius, that the judges had resolved not to permit

2. Want of religious belief.

(*r*) *Suprà*, §§ 134 *et seq.*

(*s*) 6 Co. 76 a; 1 Greenl. Ev. §§ 42, and 370, 7th Ed.

(*t*) Introd. pt. 1, § 12.

(*u*) Ph. & Am. Ev. 12; Rosc. Crim. Ev. 127, 4th Ed.; *The Queen's case*, 2 B. & B. 284; *R.* v. *Taylor*, 1 Peake, 11; *R.* v. *White*, 1 Leach, C. L. 430; *R.* v. *Serva*, 2 Car. & K. 56; see also 1 & 2 Vict. c. 105.

(*v*) Ph. & Am. Ev. 12; Rosc. Crim. Ev. 127, 4th Ed.

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adult witnesses to be interrogated respecting their belief of the Deity and a future state"(*x*); and adds, that "it is probably more conducive to the course of justice that this should be presumed till the contrary is proved. And the most religious witness may be scandalized by the imputation, which the very question conveys." This last is a strange argument; for the most respectable witness may be scandalized by *questions* imputing to him any possible form of crime, and yet such may be and frequently are put, and it is essential for the ends of justice that the right to put them should exist. Some of the American authorities adopt the conclusion of Professor Christian; but for different reasons. Witnesses, say they, are not allowed to be questioned as to their religious belief, not because it tends to disgrace them, but because it would be a personal scrutiny into the state of their faith and conscience, foreign to the spirit of free institutions, which oblige no man to avow his belief(*y*). Others of them, however, assign as the reason "that the witness could not be permitted in court to *explain* or *deny* the declarations imputed to him, because it would be *incongruous* to admit a man to his oath, for the purpose of ascertaining whether he had the necessary qualifications to be sworn"(*z*). But surely these views are extremes. On the one hand, if a witness may be questioned as to his religious opinions, it can only be on the assumption that a knowledge of them would in some way assist the tribunal, in which case they become facts in issue, and any legitimate evidence affecting them ought to be received. Very strong proof would doubtless be required, to induce a court to disbelieve the answers of a witness on these subjects—for the question is not what his religious opinions have been at any former period,

(*x*) 3 Christ. Blackst. 369, note 14.

(*y*) 1 Greenl. Ev. § 370, note (2), 7th Ed.

(*z*) Appleton on Evid. pp. 26, 27.

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but what they are at the moment when he is standing in the box. On the other hand, it is an abuse of the great principles of civil and religious liberty to object to such an examination as inquisitorial. The object of it is not to pry into the speculative views of the witness, but to enable the tribunal to estimate his trustworthiness—in accordance with which it is fully established that he cannot be questioned as to any *particular* religious opinion, or even whether he believes in the Old or New Testament. No question can be asked beyond whether he believes in a God the avenger of falsehood, and will designate a mode of swearing binding on his conscience (*a*); and if he complies with these, he cannot be asked whether he considers any other mode *more* binding, for such a question is unnecessary and irrelevant (*b*). And we apprehend that although these questions may be *put*, a witness, if he be an Atheist or a Theist, is not bound to *answer*; for by so doing he exposes himself to an indictment under the 9 & 10 Will. 3, c. 32, and perhaps also at common law; and it is an established principle that no man is bound to criminate himself (*c*).

§ 162. The ordinary form of swearing in English courts of common law is well known. The witness, holding the New Testament (*d*) in his bare right hand, is addressed by the officer of the court in a form, which varies according to the nature of the proceedings.

In criminal cases, when the accused is in custody, it runs thus:—

"The evidence that you shall give to the court and jury, sworn between our sovereign lady the Queen and

(*a*) See the authorities cited *supra*, §§ 134 *et seq.*

(*b*) So held by the judges in *The Queen's case*, 2 B. & B. 284.

(*c*) *Supra*, ch. 1, §§ 126 *et seq.*

(*d*) Strictly speaking, this should be the four Evangelists; but the distinction is disregarded in practice.

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the prisoner at the bar, shall be the truth, the whole truth, and nothing but the truth: So help you God."

When the accused is not in custody the form is the same, except that he is then described as "the defendant."

In civil cases it is—

"The evidence that you shall give to the court and jury, touching the matters in question, shall be the truth, the whole truth, and nothing but the truth: So help you God."

The witness then kisses the book.

But there can be little doubt that if a witness allows himself to be sworn in either of these forms, or perhaps in any other form, without objecting, he is liable to be indicted for perjury if his testimony prove false (*e*).

§ 163. Numerous instances are to be found in our books, of the application of the principle that witnesses are to be sworn in that form which they consider binding on their consciences. Members of the Kirk of Scotland (*f*), and others (*g*), who object to kissing or touching the book, have been sworn by lifting up the hand while it lay open before them. In Ireland, Roman Catholics are (or at least were) sworn on a New Testament with a cross delineated on the cover (*h*). Jews are sworn on the Pentateuch, keeping on their hats, the language of the oath being changed from "So help you God" to "So help you Jehovah." Mohammedans are sworn on the Koran, and the ceremony adopted in *R.* v. *Morgan* (*i*) is thus described. The book was produced. The witness first placed his right hand flat upon it, put the other hand to his forehead, and brought the top of his forehead down to the book, and touched it with his head, he then looked for some time upon it;

(*e*) *Sells* v. *Hoare*, 3 B. & B. 232; 1 & 2 Vict. c. 105.
(*f*) *Mee* v. *Reid*, 1 Peake, 23.
(*g*) *Colt* v. *Dutton*, 2 Sid. 6; *Mildrone's case*, 1 Leach, C. L. 412; *Walker's case*, *Id.* 498.
(*h*) Mac Nally, Ev. 97.
(*i*) 1 Leach, C. L. 54.

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and on being asked what effect that ceremony was to produce, he answered that he was bound by it to speak the truth. In a recent case a different course was followed. The officer of the court asked the witness what form of oath he deemed binding on his conscience, who replied, the oath in the usual words, provided he were sworn on the Koran; and he was sworn accordingly. In another case a similar question was put to a Parsee witness, who was sworn in the same manner, except that instead of the Koran he was sworn on a book which he brought with him (*k*). According to the report of *Omychund* v. *Barker* (*l*), part of the ceremony of swearing a Hindoo consists in his touching the foot of a Bramin, or, if the party swearing be himself a priest, then the Bramin's hand; but, if this is deemed by their religion essential to the validity of an oath, it is obvious that Hindoos cannot be sworn in countries where no Bramins are to be found. This however appears not to be their only form of swearing (*m*); and we understand that, in some parts of India at least, the natives are sworn on a portion of the water of the Ganges. A Chinese witness has been sworn thus (*n*). On getting into the witness-box he knelt down, and a china saucer having been placed in his hand, he struck it against the brass rail in front of the box and broke it. The officer then administered the oath in these words, which were translated by the interpreter into the Chinese language. "You shall tell the truth and the whole truth; the saucer is cracked, and if you do not tell the truth your soul will be cracked like the saucer" (*o*).

(*k*) These statements are made on the authority of the late Mr. Coleman, senior clerk to Pollock, C. B.

(*l*) 1 Atk. 21.

(*m*) Goodeve, Evid. 76, 77; 1 Stra. Hindù Law, 311.

(*n*) *R.* v. *Entrehman*, Car. & M. 248. See also Peake, Ev. 141, note (*f*), 5th Ed.

(*o*) According to a newspaper report, this form was followed at the Middlesex Sessions, April 2, 1855, in a case of *R.* v. *Sichoo*,

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§ 164. Whether this deference to the conscience of witnesses would be carried so far as to allow a form of oath involving rites which our usages would pronounce improper or indecent; as, for instance, the sacrifice of an animal, which was often resorted to in ancient, and occasionally even in modern, times (*p*); or the swearer placing his hand under the thigh of the person by whom the oath is administered, as was the custom of patriarchal times (*q*); has not been settled by authority. The great question in all such cases would be, whether the ceremony suggested was malum in se, and the scruples of the witness against being sworn in any other way were expressed bonâ fide: or whether they were affected merely with the view of evading the obligation of an oath, or turning the administration of justice into ridicule.

§ 165. Atheism, and other forms of infidelity which deny all exercise of Divine power in rewarding truth and punishing falsehood, remained untouched by *Omychund* v. *Barker* and the above decisions, and continued to be recognized as grounds of incompetency (*r*). But it was gravely questioned whether this state of the law ought to be maintained, at least so far as *casual* evidence was concerned? Was it wise to leave it in the power of every man whose breast was the repository, perhaps the sole repository, of evidence affecting the lives and fortunes of his fellow citizens, to stifle that evidence by pretending to hold erroneous views on the

with the addition, that the saucer was filled with salt.

(*p*) See Genes. xv. 9 *et seq.*; Grotius de Jur. Bell. ac Pac. lib. 2, c. 13, § 10; Liv. lib. 1, c. 24. It is said that in the island of Hong Kong, even since it came into the possession of the British, part of the ceremony of swearing a Chinese witness consisted in the cutting off the head of a live cock or live fowl. Berncastle's Voyage to China, vol. 2, p. 39.

(*q*) Genesis, ch. xxiv. ver. 2; ch. xlvii. ver. 29.

(*r*) See *Maden* v. *Catanach*, 7 H. & N. 360.

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subject of religion? And even supposing the atheism, epicureanism, &c., to be ever so unfeigned and genuine, was it not more properly an objection to the *credit* than to the *competency* of the witness?—for it amounted simply to this, that out of *four* sanctions of truth *one* had no influence on his mind (*s*). The only case, as had been well observed, in which "Cacotheism," or bad religion, was a legitimate ground for the exclusion of testimony, was where a man belonged to a religion the god of which ordained perjury (*t*); and the fanatic whose creed allowed mendacity in private and false swearing in public (*u*), was more dangerous in the

(*s*) 5 Benth. Jud. Ev. 125, 126. See also Introd. pt. 1, §§ 16 *et seq.* and pt. 2, § 55.

(*t*) See Benth. Jud. Ev. bk. 9, pt. 3, ch. 5, s. 2.

(*u*) "Of all the religious codes known, the Hindoo is the only one by which, in the very text of it, if correctly reported, a licence is in any instance expressly given to false testimony, delivered on a judicial occasion, or for a judicial purpose. * * * Cases, some extra-judicial, some judicial, and upon the whole in considerable variety and to no inconsiderable extent, are specified, in which falsehood, false witness, false testimony, are expressly declared to be allowable. 1. False testimony of an exculpative tendency, in behalf of a person accused of any offence punishable with death. Three cases, however, are excepted: viz. 1. Where the offence consists in the murder of a Bramin; or 2. (what comes to the same thing), a cow; or 3. In the drinking of wine, the offender being, in this latter case, of the Bramin caste. * * * In the representation of the other cases, scarce a word could be varied without danger of misrepresentation; word for word they stand as follows: 'If a marriage for any person may be obtained by false witness, such falsehood may be told; as upon the day of celebrating the marriage, if on that day the marriage is liable to be incomplete, for want of giving certain articles, at that time, if three or four falsehoods be asserted, it does not signify; or if, on the day of marriage, a man promises to give his daughter many ornaments, and is not able to give them, such falsehoods as these, if told to promote a marriage, are allowable. If a man, by the impulse of lust, tells lies to a woman, or if his own life would otherwise be lost, or all the goods of his house spoiled, or if it is for the benefit of a Bramin, in such affairs, falsehood is allowable.'" Benth. Jud. Ev. vol. i. pp. 235, 236. See also vol. v. p. 134. We have verified his reference for these extraordinary statements. The above passages will be found in the translation of Pootee, ch. 3, s. 9,

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witness-box than any form of infidel that could present himself. Even Atheism, as was justly remarked by Lord Bacon (*x*), "leaves a man to sense, to philosophy, to natural piety, to laws, to reputation: all which may be guides to an outward moral virtue, though religion were not; but superstition dismounts all these, and erecteth an absolute monarchy in the minds of men." And, whatever might have been urged formerly in favour of the exclusion in question, it seemed inconsistent to retain it at the present day; since the 6 & 7 Vict. c. 22 had allowed the reception, in the British colonies, of the unsworn testimony of the members of certain barbarous and uncivilized races, who are described in that statute, (whether truly or not is immaterial to our present purpose,) as "destitute of the knowledge of God and of any religious belief." A similar change in the law on this subject had been effected by the recent legislation of some of the United States of America, whereby the want of religious belief was treated as an objection to the *credit* not to the *competency* of a witness (*y*). And, as we shall see presently, our own legislature has at length adopted these views (*z*).

in Halhed's Code of Gentoo Laws. See further on this subject, Goodeve, Evid. 114, 115; and the Ordinances of Menu, ch. 8, § 112, translated by Sir Wm. Jones. The lower orders of Irish, although timorous of taking even true oaths in general, commonly consider perjury to save a criminal from capital punishment either as no crime at all, or at most a peccadillo. To these instances may be added the principle laid down by Mascardus relative to confessions to clergymen, who, not satisfied with contending that such confessions ought to be inviolable, goes on to say that if the priest be examined as a witness to prove what was stated to him in confession, "potest dicere *se nihil scire*, ex eo quod illud, quod scit, scit ut Deus, et ut Deus non producitur in testem, sed ut homo, et tanquam homo ignorat illud, super quo producitur:" Mascardus, de Prob. Quæst. 5, NN. 50, 51; 1 Greenl. Ev. § 247, 7th Ed.

(*x*) Bacon's Essay on Superstition.

(*y*) Appleton, Evid., App. 272, 277, 278.

(*z*) See 32 & 33 Vict. c. 68, s. 4.

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§ 166. The third ground remains to be noticed, namely, the refusal by the person called as a witness, to comply with religious forms,—in other words, to guarantee the truth of his testimony by the sanction of an oath in any shape. A perverse refusal to be sworn was treated as a contempt of court; but great difficulty had arisen in modern times from the circumstance that several sects of Christians, and individual members of other sects, entertained conscientious objections to the use of oaths; relying on the command in the New Testament, "Swear not at all" (*a*). In some instances

3. Refusal to comply with religious forms.

(*a*) Matt. v. 34. In the original "μὴ ὀμόσαι ὅλως," in the Vulgate "non jurare omninò;" and the prohibition is repeated James, v. 12. Most Christians consider that these words are only to be understood with reference to profane, rash, and perhaps evasive swearing, and were not at all intended to prohibit oaths taken according to the teaching of the Old Testament, "in truth, in judgment, and in righteousness." Jerem. iv. 2. The discourse contained in Matt. v., commonly called the Sermon on the Mount, of which the above passage forms part, is directed generally against abuses and evasions of the moral law; all intention of revoking any part of which is expressly disclaimed: ver. 17. Thus with respect to the subject in question: the Jews were commanded to swear by the name of God, Deut. vi. 13, and were told that they must not forswear themselves, Lev. xix. 12. Now, the Sermon on the Mount does not abrogate this, but, on the contrary, proceeds to shew that swearing by created things is in effect swearing by the Creator of them. Matt. v. ver. 33 *et seq.*, "Ye have heard that it hath been said by them" (qu. *to* them? "ἐρρέθη τοῖς ἀρχαίοις") "of old time, Thou shalt not forswear thyself, but shalt perform unto the Lord thine oaths: But I say unto you, Swear not at all; neither by heaven; for it is God's throne: nor by the earth; for it is his footstool: neither by Jerusalem; for it is the city of the great King. Neither shalt thou swear by thy head, because thou canst not make one hair white or black. But let your communication be, Yea, yea; Nay, nay: for whatsoever is more than these cometh of evil." This seems confirmed by a subseqnent passage of the same gospel, Matt. xxiii. 16 *et seq.*, where our Lord addresses the scribes and Pharisees thus: "Woe unto you, ye blind guides, which say, Whosoever shall swear by the temple, it is nothing; but whosoever shall swear by the gold of the temple, he is a debtor. Ye fools and blind: for whether is greater, the gold, or the temple that sanctifieth the gold? And, whosoever shall swear by the altar it is nothing; but whosoever

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the legislature, satisfied that these scruples were bonâ fide, judiciously gave way to them, and interposed for the relief of the parties, by substituting for an oath a solemn affirmation or declaration, rendering, however, a false affirmation or declaration punishable as perjury. The statutes on this subject extended to Quakers (*b*), Moravians (*c*), and Separatists (*d*); as also to persons who had been Quakers or Moravians, but though ceasing to be such continued to object conscientiously to taking oaths (*e*). The difference in the forms of affirmation given by these statutes is singular. In the case of Quakers and Moravians it runs thus:

"I *A. B.* being one of the people called Quakers [*or* one of the persuasion of the people called Quakers, *or* of the United Brethren called Moravians, *as the case may be*] do solemnly, sincerely, and truly declare and affirm," &c.

With the Separatists it is:

"I *A. B.* do, in the presence of Almighty God, solemnly, sincerely, and truly affirm and declare that I

sweareth by the gift that is upon it, he is guilty. Ye fools, and blind: for whether is greater, the gift, or the altar that sanctifieth the gift? Whoso therefore shall swear by the altar, sweareth by it, and by all things thereon. And whoso shall swear by the temple, sweareth by it, and by him that dwelleth therein. And he that shall swear by heaven, sweareth by the throne of God, and by him that sitteth thereon." One thing however is certain, that if the words "Swear not at all" are to be understood as an absolute prohibition of calling God to witness under *any* circumstances, the Apostle Paul has most unequivocally violated this command in several of his epistles; as, for instance, "Now the things which I write unto you, behold, *before God*, I lie not," Gal. i. 20. "*God is my witness*, whom I serve, &c.," Rom. i. 9. "I call God for a record upon my soul," 2 Cor. i. 23. See also 2 Cor. xi. 31; 1 Thes. ii. 5; Philip. i. 8. In the Epistle to the Hebrews, vi. 16, 17—also, he says, "For men verily swear by the greater: and an oath for confirmation is to them an end of all strife," and refers to the oath taken by God himself to Abraham, ver. 13—17.

(*b*) 3 & 4 Will. 4, c. 49.
(*c*) *Id.*
(*d*) 3 & 4 Will. 4, c. 82.
(*e*) 1 & 2 Vict. c. 77.

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am a member of the religious sect called Separatists, and that the taking of any oath is contrary to my religious belief, as well as essentially opposed to the tenets of that sect; and I do also in the same solemn manner affirm and declare," &c.

In the two remaining cases the form is:

"I *A. B.* having been one of the people called Quakers, [*or* one of the persuasion of the people called Quakers, *or* of the United Brethren called Moravians, *as the case may be,*] and entertaining conscientious objections to the taking of an oath, do solemnly, sincerely, and truly declare and affirm."

Members of other Christian sects, the tenets of which recognized the lawfulness of oaths, were still compellable to be sworn in criminal cases; but with respect to civil cases, it was enacted by the 17 & 18 Vict. c. 125, s. 20, that "If any person called as a witness, &c. shall refuse or be unwilling from alleged conscientious motives to be sworn, it shall be lawful for the court or judge or other presiding officer, &c., upon being satisfied of the sincerity of such objection, to permit such person, instead of being sworn, to make his or her solemn affirmation or declaration in the words following; viz.

"'I *A. B.* do solemnly, sincerely, and truly affirm and declare, that the taking of any oath is according to my religious belief unlawful; and I do also solemnly, sincerely, and truly affirm and declare,'" &c.

This enactment was extended to criminal cases by 24 & 25 Vict. c. 66.

And now the whole subject is regulated by the 32 & 33 Vict. c. 68, s. 4, which applies to *every* "*person called to give evidence* in any court of justice, *whether in a civil or criminal proceeding,*" who "*shall object to take an oath, or shall be objected to as incompetent to take an oath;*" and which enacts, that "such person shall, *if the presiding judge is satisfied*

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that the taking of an oath would have no binding effect on his conscience, make the following promise and declaration:

"'I solemnly promise and declare that the evidence given by me to the court shall be the truth, the whole truth, and nothing but the truth.'"

And that "any person who, having made such promise and declaration, shall wilfully and corruptly give false evidence shall be liable to be indicted, tried, and convicted for perjury as if he had taken an oath."

3°. Incompetency from interest.

§ 167. 3°. Incompetency from interest. The 6 & 7 Vict. c. 85, abolishing incompetency in witnesses, on the ground of their interest in the matter in question, has been already referred to (*f*). And although, by the operation of that and subsequent enactments, competency may now be looked on as the rule and incompetency the exception, still it will be advisable to treat the whole subject of incompetency from interest as it existed at the common law, and then point out the extent to which it has been modified by statute.

1. Parties to the suit—General rule of the old law—not competent.

§ 168. First, then, of the parties to the suit. "Nemo in propriâ causâ testis esse debet" (*g*), was the rule of the old law—a rule, according to the best authorities, founded *solely* on the interest which the parties to the suit were supposed to have in the event of it (*h*). Consequently, when it appeared that they had none, or that any which they ever had had been removed, their evidence was receivable: as, for instance, where one of several defendants suffered judgment by default; or had a nolle prosequi entered against him, under circum-

(*f*) *Suprà*, § 143.

(*g*) 1 Blackst. Com. 443; 3 *Id.* 371. See also Co. Litt. 6 b. It was the same in the civil law; see Dig. lib. 22, tit. 5, l. 10; Cod. lib. 4, tit. 20, l. 10; Huberus, Præl. Jur. Civ. lib. 22, tit. 5, n. 6.

(*h*) Gilb. Ev. 130, 4th Ed.; Ph. & Am. Ev. 47; *Worrall* v. *Jones*, 7 Bingh. 395; *Pipe* v. *Steel*, 2 Q. B. 733.

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stances which rendered him indifferent to the result of the contest between his companions and the plaintiff; &c. So, if the name of a party appearing on the record as a defendant, were conclusively to exclude him from being a witness, a prosecutor or plaintiff might in many cases obtain an unjust verdict, by making defendants of all the witnesses who could give evidence in favour of his real adversary (*i*). When, therefore, the court saw that there was no evidence against some of several defendants, it would, *in its discretion*, direct a verdict to be taken for them before the others were called on for their defence (*k*). And a like practice was followed, where the evidence of a person whose name appeared on the record as defendant, was required by the plaintiff or the crown.

Exceptions. At common law. Prosecutors.

§ 169. There were several common law exceptions to this part of the rule in question. The first which we shall notice was perhaps more apparent than real, viz. that the prosecutor of an indictment or information is in general a competent witness against the accused (*l*). The reason of this is, that in contemplation of law the suit is the suit of the crown, instituted not to redress the injury done to the person by whom the law is set in motion, but to punish the offender for disturbing the peace of the sovereign and the good order of society. And hence the appellor in an *appeal* of felony, while that mode of proceeding was in use, was not a competent witness against the appellee; for the suit was his own (*m*). The prosecutor of an indictment, &c. has not in general any direct pecuniary interest in the result;

(*i*) 12 Ass. pl. 11 & 12; *Dymoke's case*, Sav. 34, pl. 81; *Neilau* v. *Hanny*, 2 Car. & K. 710.

(*k*) *Creswick's case*, Clayt. 37, pl. 64; *Anon.*, 1 Mod. 11, pl. 34; *White* v. *Hill*, 6 Q. B. 487; *Wakeman* v. *Lindsey*, 14 Q. B. 625; and the authorities in the preceding note.

(*l*) "A doner evidence, chescun serra admitte pur le roy." Staundf. P. C. lib. 3, c. 8, 163 a.

(*m*) 2 Hale, P. C. 281, 282.

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for although under certain statutes he may be awarded his costs, yet this is discretionary with the judge, and does not flow as a necessary consequence from a verdict of conviction. "But," as observed in a text work published before the passing of the 6 & 7 Vict. c. 85 (*n*), "although, in general, a prosecutor or party aggrieved has no interest in the event of a prosecution, and is therefore a competent witness, there are several classes of cases in which, by virtue of some legislative enactment, he is entitled to a particular benefit or advantage upon obtaining a conviction of the party accused. In these cases, where the benefit or advantage will immediately result to the witness on a conviction being obtained, the witness will be interested, and he will be incompetent, unless the general rule of law be dispensed with in the particular case, either by some legislative enactment, or some principle of public policy requiring that his evidence shall be received." The most important instance of this latter exception is in the case of prosecutions for robbery or theft, where the party injured was competent, notwithstanding he became entitled to a restitution of his property immediately upon obtaining a conviction of the offender (*o*).

Approvers and accomplices.

§ 170. A striking exception to the common law rule, which excluded the evidence of parties interested in the event of a suit, or question at issue, is to be found in the old system of allowing persons indicted for treason or felony to become *approvers*, which has been replaced by the modern one of receiving the evidence of *accomplices*, —the "socii vel auxiliatores criminis" of the civilians. The necessity for admitting this kind of evidence has been recognized by the laws of all countries, and the practice is of extreme antiquity in our own (*p*). The

(*n*) Ph. & Am. Ev. 66.

(*o*) *Id.* 67.

(*p*) Approvers are mentioned in the ancient treatise entitled "Dialogus de Scaccario," p. 426. See also 12 Edw. IV. 10 B. pl. 26; 2 Hen. VII. 3 A. pl. 8.

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reasons for it were thus explained by a very able judge, on an important occasion (*q*): If it should ever be laid down as a practical rule in the administration of justice, that the testimony of accomplices should be rejected as incredible, the most mischievous consequences must necessarily ensue; because it must not only happen that many heinous crimes and offences will pass unpunished, but great encouragement will be given to bad men, by withdrawing from their minds the fear of detection and punishment through the instrumentality of their partners in guilt, and thereby universal confidence will be substituted for that distrust of each other, which naturally possesses men engaged in wicked purposes, and which operates as one of the most effectual restraints against the commission of those crimes, to which the concurrence of several persons is required. No such rule is laid down by the law of England or of any other country." At first sight it might seem that, previous to the 6 & 7 Vict. c. 85, the objection to the testimony of such persons would have been properly ranged under infamy of character: but as objections of that nature could only be supported by proof of a conviction for an offence, and judgment of the court thereon (*r*), it followed that a confession by a witness of any conduct, however infamous, only went to his credit; so that the true ground of objection to the evidence of approvers or accomplices, arises from the obvious interest which they have to save themselves from punishment by the conviction of the accused against whom they appear. The old law of approvement, and the modern practice of admitting the evidence of accomplices, are thus fully and clearly stated by Lord Mansfield in *R.* v. *Rudd*(*s*). "The law of approvement, in analogy to which this other practice," (i. e. of receiving the evidence of accom-

(*q*) L. C. J. Abbott's Charge to the Grand Jury on the Special Commission in March, 1820; 33 Ho. St. Tr. 689.

(*r*) *Suprà*, § 142.

(*s*) Cowp. 331, 335.

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plices,) "has been adopted, and so modelled as to be received with more latitude, is still in force, and is very material. A person desiring to be an approver, must be one *indicted* of the offence, and *in custody* on that indictment: he must confess himself guilty of the offence, and *desire* to accuse his accomplices: he must likewise upon oath discover, not only the particular offence for which he is indicted; but all *treasons* and *felonies* which he *knows of;* and after all this, it is in the discretion of the court, whether they will assign him a coroner, and admit him to be an approver or not: for if, on his confession, it appears that he is a *principal* and tempted the others, the court may refuse and reject him as an approver. When he is admitted as such, it must appear that what he has discovered is true; and that he has discovered the *whole truth.* For this purpose, the coroner puts his appeal into form; and when the prisoner returns into court, he must repeat his appeal, without any help from the court, or from any bystander. And the law is so nice, that if he *vary* in a *single circumstance,* the whole falls to the ground, and he is condemned to be hanged; if he fail in the colour of a horse, or in circumstances of time, so rigorous is the law, that he is condemned to be hanged; much more, if he fail in essentials. The same consequences follow if he does not discover *the whole truth:* and in all these cases the approver is convicted on his own confession. See this doctrine more at large in Hale's Pleas of the Crown, vol. 2, p. 226 to 236; Staund. Pl. Crown, lib. 2, c. 52 to c. 58; 3 Inst. 129.—A further rigorous circumstance is, that it is necessary to the approver's own safety, that the jury should believe him; for if the partners in his crime are not convicted, the approver himself is executed. Great inconvenience arose out of this practice of approvement. No doubt, if it was not absolutely necessary for the execution of the law against notorious offenders, that accomplices

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should be received as witnesses, the practice is liable to many objections. And though, under this practice, they are clearly competent witnesses, their single testimony alone is seldom of sufficient weight with the jury to convict the offenders; it being so strong a temptation to a man to commit perjury, if by accusing another he can escape himself. Let us see what has come in the room of this practice of approvement. A kind of *hope*, that accomplices who behave fairly and disclose the whole truth, and bring others to justice, should themselves escape punishment, and be pardoned. This is in the nature of a recommendation to mercy. * * * The accomplice is not assured of his pardon; but gives his evidence *in vinculis*, in custody: and it depends on the title he has from his behaviour, whether he shall be pardoned or executed."

§ 171. But although in strictness a jury may legally, (except where two witnesses are required by law), convict on the unsupported evidence of an accomplice or *socius criminis* (*t*); yet a judicious practice has grown up, now so generally followed as almost to have the force of law, by which judges always advise juries to require such evidence to be corroborated in some material part by untainted testimony. It is not, however, every participation in a crime which will render a party an accomplice in it so as to require his evidence to be confirmed (*u*). The nature of the confirmation in each case must of course depend very considerably on its peculiar circumstances; but a few general principles may be stated. First, then, it is not necessary that the story told by the accomplice should be corroborated in every circumstance he details in evidence: for, if so, the

(*t*) See the authorities collected *supra*, § 139, note (*n*). For the practice of the civil law on this subject, see Mascard. de Prob. Concl. 158.

(*u*) *R.* v. *Hargrave*, 5 Car. & P. 170; *R.* v. *Jarvis*, 2 Moo. & R. 40.

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calling him as a witness might be dispensed with altogether (*x*). Again, notwithstanding some old cases to the contrary, it seems now settled that the corroboration should not be merely as to the *corpus delicti*, but should go to some circumstances affecting the identity of the accused as participating in the transaction (*y*). "A man," says Lord Abinger, "who has been guilty of a crime himself will always be able to relate the facts of the case; and if the confirmation be only on the truth of that history, without identifying the persons, that is really no corroboration at all" (*z*). It is thought that confirmatory evidence by the wife of an accomplice will not suffice, for they must for this purpose be considered as one person (*a*). Neither ought the jury to be satisfied merely with the evidence of several accomplices who corroborate each other (*b*).

Issues from Chancery.

§ 172. When an issue was directed from the Court of Chancery to be tried in a court of law, it was frequently made part of the order that the plaintiff or defendant should be examined as a witness. So when a cause was referred to arbitration from a court of law, it was usually part of the rule that the arbitrator should be at liberty to examine the parties.

By statute.

§ 173. The first general statutory exception to the rule against admitting parties to the suit as witnesses, was contained in the 9 & 10 Vict. c. 95. That statute, after remodelling the County Courts, and extending their jurisdiction, enacts in its 83rd section, that "On the hearing or trial of any action or on any other

(*x*) 31 Ho. St. Tr. 980.

(*y*) *R.* v. *Farler*, 8 C. & P. 106; *R.* v. *Addis*, 6 C. & P. 388; *R.* v. *Webb*, *Id.* 595; *R.* v. *Wilkes*, 7 C. & P. 272; *R.* v. *Moores*, *Id.* 270; *R.* v. *Dyke*, 8 C. & P. 261; *R.* v. *Stubbs*, 1 Dearsl. C. C. 555.

(*z*) *R.* v. *Farler*, 8 C. & P. 108. Similar language was used by Parke, B., in *R.* v. *Parker*, Kent Sp. Ass. 1851, MS.

(*a*) *R.* v. *Neal*, 7 C. & P. 168.

(*b*) 31 Ho. St. Tr. 1122-3; *R.* v. *Noakes*, 5 C. & P. 326; *R.* v. *Magill*, Ir. Circ. Rep. 418.

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proceeding under this act, the parties thereto, their wives, and all other persons, may be examined, either on behalf of the plaintiff or defendant, upon oath, or solemn affirmation in those cases in which persons are by law allowed to make affirmation instead of taking an oath, to be administered by the proper officer of the court." But this must not be looked on as an innovation introduced for the first time; for the old Courts of Conscience and Courts of Requests acts contained similar provisions.

§ 174. Several other exceptions to the rule excluding the evidence of parties to a suit or proceeding were introduced by modern statutes: until the term "Incompetency of Parties" was almost abolished by the 14 & 15 Vict. c. 99. That statute, after in its first section repealing the proviso in the first section of the 6 & 7 Vict. c. 85, which retained the exclusion of the evidence of such parties, enacted as follows:

Sect. 2. "On the trial of any issue joined, or of any matter or question, or on any inquiry arising in any suit, action, or other proceeding in any court of justice, or before any person having by law, or by consent of parties, authority to hear, receive, and examine evidence, the parties thereto, and the persons in whose behalf any such suit, action, or other proceeding may be brought or defended, shall, except as hereinafter excepted, be competent and compellable to give evidence, either *vivâ voce* or by deposition, according to the practice of the court, on behalf of either or any of the parties to the said suit, action, or other proceeding."

Sect. 3. "But nothing herein contained shall render any person who in any criminal proceeding is charged with the commission of any indictable offence, or any offence punishable on summary conviction, competent or compellable to give evidence for or against himself or herself, or shall render any person compellable to

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answer any question tending to criminate himself or herself, &c."

Sect. 4. "Nothing herein contained shall apply to any action, suit, proceeding, or bill in any court of common law, or in any ecclesiastical court, or in either house of parliament, instituted in consequence of adultery; or to any action for breach of promise of marriage"(*c*).

The 5th sect. provided that nothing in the act contained should repeal any provision in the Wills Act, 7 Will. 4 & 1 Vict. c. 26.

2. Husbands and wives of the parties to the suit.

General rule of the old law—Not competent.

§ 175. The other persons affected by this rule of exclusion, were the husbands and wives of the parties to the suit or proceeding. Husband and wife, say our books, "sunt duæ animæ in carne unâ"(*d*); they "are considered as one and the same person in law, and to have the same affections and interests; from whence it has been established as a general rule, that the husband cannot be a witness for or against the wife, nor the wife be a witness for or against the husband, by reason of the implacable dissension which might be caused by it, and the great danger of perjury from taking the oaths of persons under so great a bias, and the extreme hardship of the case"(*e*). This rule was not limited to protecting from disclosure matters communicated in nuptial confidence, or facts the knowledge of which had been acquired in consequence of the relation of husband and wife; but was an absolute prohibition of the testimony of the witness to any facts affecting the husband or wife, as the case might be, however the knowledge of those facts might have been acquired. But the rule

(*c*) Repealed by the 32 & 33 Vict. c. 68, s. 1. See *infrà*, § 180.

(*d*) Co. Litt. 6 b. See also Litt. sect. 291; Co. Litt. 112 a, and 123 a.

(*e*) Bac. Ab. Evidence, A. 1. See also 2 Hawk. P. C. c. 46, sect. 16; *Davis* v. *Dinwoody*, 4 T. R. 678; *Hawkesworth* v. *Showler*, 12 M. & W. 45; *O'Connor* v. *Majoribanks*, 4 M. & Gr. 435; *Barbat* v. *Allen*, 7 Exch. 609.

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only applied where the husband or wife was party to the suit in which the other was called as a witness, and did not extend to collateral proceedings between third parties. In such cases, husband and wife might be examined as witnesses, although the testimony of the one tended to confirm or contradict that of the other (*f*). And the declarations of a wife acting as the lawfully constituted agent of her husband, were admissible against him like the declarations of any other lawfully constituted agent (*g*).

Exceptions.

At common law.

Charges of personal injury.

§ 176. To this branch also common law exceptions are not wanting. Where one of the married parties used or threatened personal violence to the other, the law would not allow the supposed unity of person in husband and wife, to supersede the more important principle that the state is bound to protect the lives and limbs of its citizens (*h*). Thus, on an indictment against a man for assault and battery of his wife, or vice versâ, the injured party is a competent witness (*i*); and husband and wife may swear the peace against each other (*k*). So a husband may be principal in the second degree to a rape on his wife, and she is a competent witness against him (*l*); but principal in the first degree he cannot be, for obvious reasons (*m*). So if a husband commits an unnatural offence with his wife, she is a competent witness against him (*n*). The case of abduction also falls within this exception. On indictments

Abduction.

(*f*) 1 Phill. Ev. 72, 10th Ed.; Tayl. Ev. 1235, 4th Ed.

(*g*) 1 Phill. Ev. 78 *et seq.*, 10th Ed.

(*h*) 2 Hawk. P. C. c. 46, s. 16; Peake's Ev. 173, 5th Ed.; 1 East, P. C. 455; B. N. P. 287; 1 Phill. Ev. 80, 10th Ed.

(*i*) B. N. P. 287; *R.* v. *Azire*, 1 Str. 633.

(*k*) *Anon.*, 12 Mod. 454; B. N. P. 287.

(*l*) 1 Phill. Ev. 80, 10th Ed.; 2 Hawk. P. C. c. 46, s. 16; *Lord Audley's case*, 3 Ho. St. Tr. 402, 413; Hutt. 115, 116.

(*m*) 1 Hale, P. C. 629.

(*n*) *R.* v. *Jellyman*, 8 C. & P. 604.

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under the repealed stat. 3 Hen. 7, c. 2, for forcibly taking away a woman, the female, though married to the offending party, was a competent witness against him; the reasons assigned for which by Mr. Justice Blackstone (*o*) are, that "in this case she can with no propriety be reckoned his wife, because a main ingredient, her consent, was wanting to the contract; and also there is another maxim of law, that no man shall take advantage of his own wrong, which the ravisher here would do, if by forcibly marrying a woman he could prevent her from being a witness, who is perhaps the only witness, to that very fact." This statute was replaced by the 9 Geo. 4, c. 31, s. 19, which was in its turn repealed by 24 & 25 Vict. c. 95, and its provisions re-enacted, with a few alterations, by 24 & 25 Vict. c. 100. Sect. 53 enacts, "where any woman of any age shall have any interest, whether legal or equitable, present or future, absolute, conditional, or contingent, in any real or personal estate, or shall be a presumptive heiress or coheiress, or presumptive next of kin, or one of the presumptive next of kin, to any one having such interest, whoever shall, from motives of lucre, take away or detain such woman against her will, with intent to marry or carnally know her, or to cause her to be married or carnally known by any other person; and whosoever shall fraudulently allure, take away, or detain such woman, being under the age of twenty-one years, out of the possession and against the will of her father or mother, or of any other person having the lawful care or charge of her, with intent to marry or carnally know her, or to cause her to be married or carnally known by any other person, shall be guilty of felony, &c." And by sect. 54, "whosoever shall, by force, take away or detain against her will any woman of any age, with intent to marry or carnally know her, or to cause her to

(*o*) I Blackst. Comm. 443. See *Swendsen's case*, 14 Ho. St. Tr. 559, 575; and per Abbott, C. J., in *R.* v. *Serjeant*, Ry. & Mo. 352.

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be married or carnally known by any other person, shall be guilty of felony, &c." The female so taken away is a competent witness on an indictment under these statutes; and it is said she is so, notwithstanding her subsequent assent to the marriage, and voluntary cohabitation (*p*).

§ 177. The case of bigamy presents some difficulty. The first wife, or husband, as the case may be, is not a competent witness against the accused; but our books say that the second wife, or husband, is, *after proof of the first marriage*, for that then the second marriage is a nullity (*q*); and the practice is in accordance with this. The truth however seems to be, that the second wife ought to be received in these cases as a witness against the accused, at any stage of the trial, on the same grounds which render the testimony of the wife receivable on indictments for abduction, under the 3 Hen. 7, c. 2, 9 Geo. 4, c. 31, and 24 & 25 Vict. c. 100 (*r*). It is an established principle that a woman is a competent witness against any one, even her lawful husband, who has done unauthorized violence, actual or constructive, to her *person;* besides, on a trial for bigamy, the objection to the competency of the injured female, on the ground that she is the wife of the accused, is a petitio principii; for whether she is his lawful wife, or whether he has violated the law by pretending to make her such, is the very point at issue. How strange then does it seem, that where, by a combination of falsehood, fraud, and sacrilege, a man obtains possession of a woman's person, property, and perhaps affection, her mouth is to be stopped against him because she is colourably his wife. This latter reasoning of course does not so strongly apply, to rendering the second *husband* com- Bigamy.

(*p*) 1 Ph. Ev. 83, 10th Ed.; Tayl. Evid. § 1236, 5th Ed.

(*q*) Tayl. Evid. § 1231, 5th Ed.; Rosc. Crim. Ev. 142, 4th Ed.

(*r*) *Suprà*, § 176.

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petent on a charge of bigamy brought against a female; but the first does, viz., that lawful marriage or wrongful marriage, in violation of the peace of the Queen, is the direct point in issue.

High treason —doubtful.

§ 178. What is the rule on this subject in cases of high treason, is a disputed point. Many eminent authorities lay down, that in such cases the testimony of married persons is receivable against each other (*s*), on the ground of the great heinousness of the crime; and that the ties of allegiance to the sovereign and the obligation of upholding social order, are more binding than those arising out of the relation of husband and wife, and must in the eye of the law be considered paramount to any other obligations whatever. To this it may be added, that although marriage is an institution of natural law, and as such antecedent to all forms of government, and even to the organization of civil society (*t*), the complete unity of person between husband and wife is a fiction, which the law disregards in cases where the ends of justice require it (*u*). There is, however, high authority the other way (*x*), and most of the modern text writers seem disposed to consider the evidence not receivable (*y*). They argue that as a woman is not bound to discover her husband's treason (*z*), by parity of reason she cannot be a witness against him to prove it. But to this it may be answered, that one reason why the wife is not held responsible in such a

(*s*) So *said* (not decided, for that was not the point in question,) by the court in *Mary Grigg's case*, M. 12 Car. II., T. Raym. 1. To the same effect are Gilb. Ev. 133, 4th Ed.; B. N. P. 286; 2 Ev. Poth. 311.

(*t*) Pufendorf, De Jure Nat. & Gent. lib. 6, cap. 1.

(*u*) See *suprà*, §§ 176, 177.

(*x*) 1 Hale, P. C. 301. See also 48.

(*y*) Ph. & Am. Ev. 161; 1 Ph. Ev. 72, 10th Ed.; 1 Greenl. Ev. § 345, 7th Ed.; Tayl. Ev. § 1237, 5th Ed., &c.

(*z*) *Anon.*, P. 10 Jac. I., 1 Brownl. 47; Trials per Pais, 371. See however 1 Hale, P. C. 48.

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case is, that she owes her husband a kind of allegiance, and may be supposed to be acting under his coercion—we are not aware that a *husband* would be excused from the guilt of misprision in concealing the treason of his *wife*. Under the old feudal law in this country, when the vassal took the oath of fealty to his lord, it was with the express saving of the faith which he owed to the king his sovereign lord (*a*); probably on the principle stated by Lord Chief Baron Gilbert, that our "allegiance is founded on the benefit of our protection, which is to take place of our civil interests that relate only to well being" (*b*). But the question is an embarrassing one, on which the reader must form his own judgment.

By statute.

§ 179. The statutory exceptions to this rule are now extremely numerous. So early as the 21 Jac. 1, c. 19, s. 6, the commissioners of bankruptcy were empowered to examine upon oath the wife of any bankrupt, for the purpose of finding out and discovery of the estates, goods, and chattels of the bankrupt concealed, kept, or disposed of by her; and this provision has been re-enacted in substance by "The Bankruptcy Act, 1869," the 32 & 33 Vict. c. 71, ss. 96, 97.

§ 180. The clause in the County Court Act, 9 & 10 Vict. c. 95, which rendered the parties to suits competent witnesses in those courts, extended, as has been seen, to "their wives, and all other persons" (*c*). But in the superior courts, the subsequent statute 14 & 15 Vict. c. 99, while it removed the restriction on the parties themselves in almost all cases (*d*), contained in its 3rd section an express clause, that nothing therein contained should "in any criminal proceeding render

(*a*) Litt. sects. 85—89.
(*b*) Gilb. Ev. 134, 4th Ed.
(*c*) *Suprà*, § 173.
(*d*) *Suprà*, § 174.

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any husband competent or compellable to give evidence for or against his wife, or any wife competent or compellable to give evidence for or against her husband"—language which gave rise to a doubt, whether husbands and wives were not thereby, by implication, rendered competent witnesses for and against each other in *civil* proceedings. This, after some conflict of opinion, was determined in the negative (*e*)—whether rightly or not is now immaterial to discuss; for by the 16 & 17 Vict. c. 83, s. 4, the proviso in the 6 & 7 Vict. c. 85, which continued the incompetency of the husbands and wives of the parties to a suit, &c., was repealed, and the following provisions were enacted:—

Sect. 1. "On the trial of any issue joined, or of any matter or question, or on any inquiry arising in any suit, action, or other proceeding in any court of justice, or before any person having by law or by consent of parties authority to hear, receive, and examine evidence, the husbands and wives of the parties thereto, and of the persons in whose behalf any such suit, action, or other proceeding may be brought or instituted, or opposed or defended, shall, except as hereinafter excepted, be competent and compellable to give evidence, either *vivâ voce* or by deposition according to the practice of the court, on behalf of either or any of the parties to the said suit, action, or other proceeding."

Sect. 2. "Nothing herein shall render any husband competent or compellable to give evidence for or against his wife, or any wife competent or compellable to give evidence for or against her husband, in any criminal proceeding, or in any proceeding instituted in consequence of adultery."

Sect. 3. "No husband shall be compellable to disclose any communication made to him by his wife during the marriage, and no wife shall be compellable to disclose

(*e*) *Stapleton* v. *Crofts*, 18 Q. B. 367; *Barbat* v. *Allen*, 7 Exch. 609; *M'Neillie* v. *Acton*, 17 Jurist, 661.

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any communication made to her by her husband during the marriage."

And now by the 32 & 33 Vict. c. 68, it is enacted as follows:—

Sect. 1. "The fourth section of chapter ninety-nine of the statutes passed in the fourteenth and fifteenth years of her present Majesty, and so much of the second section of 'The Evidence Amendment Act, 1853,' as is contained in the words 'or in any proceeding instituted in consequence of adultery,' are hereby repealed."

Sect. 2. "*The parties to any action for breach of promise of marriage shall be competent to give evidence in such action:* provided always, that no plaintiff in any action for breach of promise of marriage shall recover a verdict, unless his or her testimony shall be corroborated by some other material evidence in support of such promise."

Sect. 3. "*The parties to any proceeding instituted in consequence of adultery, and the husbands and wives of such parties, shall be competent to give evidence in such proceeding:* provided that no witness in any proceeding, whether a party to the suit or not, shall be liable to be asked or bound to answer any question tending to show that he or she has been guilty of adultery, unless such witness shall have already given evidence in the same proceeding in disproof of his or her alleged adultery."

3. Competency of parties and their husbands or wives in revenue prosecutions.

§ 181. We have seen that the 14 & 15 Vict. c. 99, having by its second section removed the incompetency of parties in general, retained by its third section the incompetency of persons who in any criminal proceeding were charged with the commission of any indictable offence, or any offence punishable on summary conviction; and both that statute and the 16 & 17 Vict. c. 83, s. 2, expressly provided that, in criminal proceedings, husbands and wives should not be competent or com-

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pellable to give evidence for or against each other (*f*). In this state of the law arose the case of *The Attorney-General* v. *Radloff* (*g*), which was an information in the Exchequer by the attorney-general for an alleged violation of the revenue laws; and the question was raised, whether the defendant was rendered a competent witness by the 14 & 15 Vict. c. 99. Pollock, C. B., before whom the case was tried, held his evidence inadmissible; and a verdict having been given for the crown, a rule was granted for a new trial on the ground that the witness had been improperly rejected. After argument and time taken to consider, the barons, differing in opinion, delivered their judgments separately; Pollock, C. B., and Parke, B., holding that the witness had been rightly rejected, and Platt and Martin, BB., that he ought to have been received. The rule for a new trial accordingly dropped; but several statutes have since been passed with the view of settling the law on this subject. The 17 & 18 Vict. c. 122, s. 15, enacted, that the 2nd section of the 14 & 15 Vict. c. 99, should not be deemed to apply to any prosecution, suit, or other proceeding in respect of any offence, or for the recovery of any penalties or forfeitures, under any law then or thereafter to be made relating to the customs or inland revenue. This was repealed by the 18 & 19 Vict. c. 96, s. 44, and re-enacted by sect. 36 of that act. The 20 & 21 Vict. c. 62, without repealing that portion of the 18 & 19 Vict. c. 96, enacts in its 14th section, that "The several acts which declare and make competent and compellable a defendant, to give evidence in any suit or proceeding to which he may be a party, shall not be deemed to extend or apply to defendants in any suit or proceeding instituted under any act relating to the customs." It will be observed that this last statute only

(*f*) *Suprà*, § 180. (*g*) 10 Exch. 84.

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speaks of acts relating to the *customs*, and none of the above acts makes any mention of the husbands or wives of the parties to the proceedings. But the 18 & 19 Vict. c. 96, s. 36, and the 20 & 21 Vict. c. 62, s. 14, are now repealed by 28 & 29 Vict. c. 104, s. 33. And sect. 34 of that statute enacts, that 14 & 15 Vict. c. 99, ss. 2 and 3, and 16 & 17 Vict. c. 83, "shall extend and apply to proceedings at law on the revenue side of the court; and any proceeding at law on the revenue side of the court shall not, for the purposes of this act, be deemed a criminal proceeding within the meaning of the said sections and act as extended and applied by the present section." By sect. 35, the revenue side of the court, as a court of law, shall be deemed to be a court of civil judicature within the meaning of sect. 103 of the Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125; and sect. 22 contains a similar provision, relative to the Court of Exchequer exercising jurisdiction or authority in suits relating to the revenues of the crown, and of the duchies of Lancaster and Cornwall, instituted and conducted according to the forms of equitable procedure.

4. Competency of parties in the Court for Divorce and Matrimonial Causes.

§ 182. The 14 & 15 Vict. c. 99, s. 4, as has been seen (*h*), retained the incompetency of the plaintiff and defendant in all proceedings instituted in consequence of adultery (*i*). And by sect. 48 of the 20 & 21 Vict. c. 85, which created the Court for Divorce and Matrimonial Causes, it was enacted that the rules of evidence observed in the superior courts of common law at Westminster, should be applicable to and observed in the trial of all questions of fact in that court. The effect of the 32 & 33 Vict. c. 68, s. 3 (*j*), therefore, will be to render competent as witnesses, in that court, the parties to any

(*h*) *Suprà*, § 174.

(*i*) But a petition for restitution of conjugal rights, to which an answer had been filed, charging adultery, was held not to be within the act. *Blackborne* v. *Blackborne*, L. Rep., I P. & D. 563.

(*j*) See *suprà*, § 180.

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proceeding instituted therein in consequence of adultery, and the husbands and wives of such parties.

By the 22 & 23 Vict. c. 61, s. 6, it is enacted that "On any petition presented by a wife, praying that her marriage may be dissolved by reason of her husband having been guilty of adultery coupled with cruelty, or of adultery coupled with desertion, the husband and wife respectively shall be competent and compellable to give evidence of or relating to such cruelty or desertion." And it was held, that a petitioner or respondent, who was examined under that section upon an issue of cruelty or desertion, might be *cross-examined* on the question of his or her adultery (*k*). But it would seem that, since the 32 & 33 Vict. c. 68, s. 3, such cross-examination would not in general be admissible;—the language of that section being, "that no witness *in any proceeding* * * * *shall be liable to be asked or bound to answer* any question tending to show that he or she has been guilty of adultery, unless such witness shall have already given evidence in the same proceeding in disproof of his or her alleged adultery."

Certain persons who may seem incompetent witnesses.

§ 183. Before dismissing the subject of the incompetency of witnesses, it will be necessary to advert to certain persons who, in consequence of their peculiar position or functions, may seem incompetent to give evidence. And foremost among these stands THE SOVEREIGN. It has been made a question whether he can be examined as a witness in our courts of justice, and if so, whether the examination must be on oath in the usual way. Conceding of course that no compulsory process could be used to obtain the evidence, it seems that both questions ought to be answered in the affirmative: and of this opinion are some modern text writers (*l*). It has been objected that as the tribunal, at least the

1. THE SOVEREIGN.

(*k*) *Boardman* v. *Boardman*, L. Rep., 1 P. & D. 233.

(*l*) Tayl. Ev. § 1246, 5th Ed. See Ph. & Am. Ev. 8.

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Court of Queen's Bench, represents the sovereign, there is an absurdity in asking him to give testimony to himself; but the same might be said of his pleading before himself, which nevertheless takes place in all criminal trials—where the sovereign is represented in one sense by the court, und in another by the attorney-general or those who act for him. In 2 Rol. Abr. 686, H. pl. 1, is the following passage: "Semble que le roy ne poet estre un testimonie en un cause per son lettres desouth son signett manuell. Contra Hobard's Rep. 288. enter Abigny et Clifton en Chancery allow." But in *Omichund* v. *Barker* (*m*), L. C. J. Willes says, "Even the certificate of the king under his sign manual of a matter of fact, (except in one old case in chancery, Hob. 213), has been always refused." The case referred to in these books seems to be that of *Abignye* v. *Clifton*, Hob. 213, temp. Jac. I., in which the question was concerning a promise supposed by the plaintiff to be made to him of assurance of land upon the marriage of his lady, being daughter and heir apparent to Lord Clifton and his lady. "The king," says the report, "by his letters under his signet manual certified to the late Lord Chancellor, and also to this, the manner and substance of the promise as it was made to his majesty: in regard whereof his majesty gave to the Lord Abignye £18,000 in lieu of £1,000 per annum in land which he had promised, which certificate was allowed upon the hearing for a proof without exception for so much." This case stands alone, and amounts to little. 1. The evidence was admitted without exception taken. 2. It is probable that the reason for admitting it was, not that propter honoris respectum the sovereign could not be examined as a witness, but a forced analogy between the certificate of the king and the certificate of marriage given by a bishop, &c. And this view derives some

(*m*) Willes, 550.

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confirmation from the fact that in the same reign, in a case of *Alsop* v. *Bowtrell* (*n*), the Court of King's Bench held for sufficient proof of a marriage at Utrecht, a certificate under the seal of the minister there, and of the town, that the parties had been married there, and that they cohabited for two years together as man and wife; a decision condemned by C. J. Willes in *Omichund* v. *Barker*, already cited, and clearly not law at the present day. Perhaps, also, as the certificate in *Abignye* v. *Clifton* related to a grant of money by the crown, the court may have confounded it with a royal charter: but in any view of that case it is far from a judicial determination that the testimony of the sovereign can *in general* be received without oath. Sir Matthew Hale also seems to have thought otherwise, for he says (*o*), "If a man be indicted of high treason, the king cannot by his great seal or *ore tenus* give evidence, that he is guilty, for then he should give evidence in his own cause. Nay, although he may in person sit on the king's bench, yet he cannot pronounce judgment in case of treason, but it is performed by the senior judge, for as he cannot be a witness, so he cannot be a judge *in propriâ causâ*. And the same law is for felony for the same reason, yet in some cases the king's testimony under his great seal is allowable, as in an essoin de servitio regis, the warrant under the great seal is a good testimonial of it." If the sovereign is an incompetent witness under any circumstances, the whole of this passage is unmeaning and irrelevant. The only authorities, however, which Hale cites for the position, that even in criminal cases the sovereign cannot give evidence, are the old records of the reversal in parliament in the 1 Edw. III. of the attainders, in the preceding reign, of the Earl of Lancaster and the Mortimers (*p*); which

(*n*) Cro. Jac. 541.
(*o*) 2 Hale, P. C. 282.
(*p*) These records are set out at length in 1 Hale, P. C. 344, and 2 *Id.* 217, respectively.

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certainly do not bear it out; for the ground of the reversal of those judgments appears clearly, from the records themselves, to have been that the accused were not arraigned and tried by their peers in due course of law, but the king's asseveration of their guilt was taken as conclusive (*q*). In Taylor on Evidence (*r*) it is stated, on the authority of Lord Campbell in his Lives of the Chancellors, that "the point arose in the reign of Charles I., when the Earl of Bristol, who was impeached for high treason, proposed to call the king for the purpose of proving certain conversations which he had held with him while prince. The subject was referred to the judges; but they, acting under the direction of his Majesty, forbore from giving any opinion, and the question remains to this day undetermined." In *The Attorney-General* v. *Radloff* (*s*), Parke, B., said incidentally, for it was wholly needless to the decision of the case, "It is clear that the sovereign cannot be a witness, because there is no means of compelling her attendance." But, although there may be no means of compelling the attendance of a witness who resides out of the jurisdiction of the court, his evidence is perfectly receivable if he attends voluntarily; and there are many questions which may be put to almost any witness, which it is quite discretionary with him whether he will answer. It only remains to add, that no inference can be drawn from the fact, that in the various cases of discharging firearms and throwing missiles at the sovereign, which

(*q*) If the general lawlessness of the times of Edw. II. should be deemed insufficient to account for this enormous irregularity even in a state prosecution, a solution for it may be found in the views of the middle ages. For instance, in the laws of Wihtræd, King of Kent, about the beginning of the 8th century, § 16, we read, "Let the word of a bishop and of the king be without an oath, incontrovertible." See ad id., Pufendorf, De Jur. Nat. & Gent. lib. 4, cap. 2, § 2, vers. fin.; Devotus, Inst. Canon. lib. 3, tit. 9, § XII., not. 1, 5th Ed.

(*r*) § 1246, 4th Ed.

(*s*) 10 Exch. 84, 94.

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have occurred from time to time (*t*), the sovereign was not examined as a witness; for in proceedings for assault or other personal injury it is not requisite as matter of law that the injured party appear in the witness-box; his absence is only matter of observation, which in the case of the sovereign would be fully answered by the inconvenience of calling such a witness, so long as any other satisfactory proof could be procured.

2. Attorney in a cause.

§ 184. The other persons to whom we have alluded, as apparently incompetent to give evidence, are the counsel and attornies engaged in a cause, and the judges and jurymen by whom it is tried. With respect to one of these there is no difficulty, for it is settled law and every days' practice that an attorney is a competent witness either for or against his client: although neither attorney nor counsel will be permitted, without the consent of the client, to disclose matters communicated in professional confidence (*u*). But whether the counsel in a cause are competent witnesses was formerly a disputed question. In a case of *Stones* v. *Byron* (*x*), which was tried before a sheriff, the plaintiff appeared by his attorney, who acted as his advocate, and who, after the witnesses on both sides had been examined, made a speech in reply, and proposed to call himself as a witness to contradict the defence set up. This was objected to, but allowed by the sheriff; and a rule was granted for a new trial, on the ground that the evidence ought to have been rejected, which came on for argument before Patteson, J., in the Bail Court. In support of the rule it was argued that "it would be a practice, attended with the most mischievous consequences, if an attorney or any other person, acting as the advocate of a party,

3. Counsel in a cause.

(*t*) See the cases of *Hadfield* in 1800, 27 Ho. St. Tr. 1282; of *Collins* in 1832, 5 C. & P. 305; of *Oxford* in 1840, 9 *Id.* 525, &c.

(*u*) *Infrà*, bk. 3, pt. 2, ch. 8.

(*x*) 4 Dowl. & L. 393; 1 B. C. R. 248: Mich. 1846.

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could afterwards present himself before the jury as a witness to support those statements he had been making in the course of his speech. The characters of an advocate and a witness should be sedulously kept apart. The one was a person zealously and warmly espousing the interests of his client; the other a person sworn fairly and impartially, without bias or favour to either party, to tell the truth of what he had witnessed or heard. The jury might have considerable difficulty in separating those statements which they had heard from a person as advocate, from those which they had heard from the same person as witness." The only authorities cited were the precedent in the case of Sir Thomas More (*y*), where the then solicitor-general, who was conducting the prosecution, left the bar and was received as a witness for the crown; which the counsel in *Stones* v. *Byron*, quoting the language of Lord Campbell in his Lives of the Chancellors, pronounced an "eternal disgrace of the court who permitted such an outrage on decency;" and the observations of the Court of King's Bench in *R.* v. *Brice* (*z*), where it was held that the prosecutor of an indictment has no right to address the jury and state the case for the prosecution; for this among other reasons, that "the prosecutor may be, and generally is, a witness; and that it is very unfit that he should be permitted to state not upon oath, facts to the jury which he is afterwards to state to them on his oath." It appears, however, that in a case of *R.* v. *Milne*, reported in a note to *R.* v. *Brice*, Lord Ellenborough held, that a prosecutor who waived his right to give evidence was not even then entitled to address the jury. The true ground of the practice unquestionably is, that in contemplation of law the suit is the suit of the crown, and the prosecutor no more interested in it than any

(*y*) 1 Ho. St. Tr. 386, 390. (*z*) 2 B. & A. 606.

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other witness (*a*). Patteson, J., in the case we are now considering, took the view of the defendant's counsel, and made the rule absolute; saying that he did not think the course of proceeding adopted at the trial was proper, or consistent with the due administration of justice; that the evidence of the attorney ought not to have been received, and that, having been received, there ought to be a new trial. In a subsequent case of *Dunn* v. *Packwood*, also in the Bail Court (*b*), a rule for a new trial was moved for on the ground that the plaintiff's attorney had acted as an advocate in the cause, and had then irregularly given evidence as a witness: on showing cause, the case of *Stones* v. *Byron* was referred to, but sought to be distinguished in this way, that in the actual case the attorney simply opened his client's case and then presented himself as a witness, and did not comment on the evidence offered by the other party, as was done in *Stones* v. *Byron*. Erle, J., however, made the rule absolute, saying, "I think it a very objectionable proceeding on the part of an attorney, to give evidence when acting as advocate in the cause." In the report in the Bail Court Reports, he is said to have added, "This principle was acted on by the late Lord Tenterden, and I think it is sound." It will be observed that both these cases are the decisions of single judges, whose language falls short of laying down as a universal rule, that under no circumstances whatever can a counsel or advocate be examined as a witness in a cause in which he is acting as such. It would, we apprehend, be impossible to support such a position, for there are cases in which the advocate might be the sole repository of the most important evidence: and it is no answer to

(*a*) 2 Rol. Abr. 685, "Testimonies," pl. 5; *R.* v. *Brice*, 2 B. & A. 606.

(*b*) 11 Jurist, 242; 1 B. C. R. 312; S. C. nom. *Deane* v. *Packwood*, 4 D. & L. 395, note (*b*): Hil. 1847.

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this to say, that if aware of that fact he ought to decline to act professionally in the cause; for it not unfrequently happens, especially in criminal courts, that facts bearing most powerfully on the issue appear relevant in the course of a trial, though at its commencement it was impossible to foresee their relevancy. Suppose an indictment for a murder at A., to which the defence set up is a false alibi, that the accused was on that day and hour in a certain room in a certain house at B.; the counsel for the prosecution may have been alone in that room at that day and hour, and may know of his own knowledge that the accused was *not* then there; is his evidence to be excluded? These cases, however, of *Stones* v. *Byron* and *Dunn* v. *Packwood*, taken at the strongest, only shew that an advocate is not a competent witness *for* his client, and leave untouched the question whether he is competent for the other side. Now it would be very dangerous to allow a party who knows that important, perhaps the only important, evidence against him will be given by an advocate, to shut that person's mouth by retaining him as his counsel; and if it be said that no counsel should accept the retainer under such circumstances, the answer is, that the question is not what the honour of the bar exacts, but what the law will allow. Professional privileges may be abused, and the supposed impeccability of every member of a numerous profession is an unsafe basis of legislation. Besides, it may be as well to remark, that under the old law, previous to the 6 & 7 Vict. c. 85, when an interest in the event of the suit was ground for the rejection of a witness, the rule did not apply to a case where the interest was *fraudulently* acquired in order to create incompetency (*c*).

§ 185. Nor is this matter so barren of authority as appears to have been assumed in the two cases decided

(*c*) Ph. & Am. 144.

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in the Bail Court. In Bacon's Abridgment, Evidence, A. 3, it is said, "The inconveniency would be very great if a counsel were not at all to be made use of as a witness; for by this means every such person's evidence may be taken off by giving him a fee." In *Cuts* v. *Pichering* (*d*), the court laid down *obiter*, that with respect to competency to bear testimony the same law was of an attorney or counsel. And Sir John Hawles, in his observations on the State Trials in 1 Jac. II. (*e*), tells us, "Every man knows that a counsel has been enforced to give evidence against his client, provided it be not of a secret communication to him by his client." The same is stated in the book called "Trials per Pais" (*f*): and in the cases of *Waldron* v. *Ward* (*g*) and *Sparke* v. *Middleton* (*h*), counsel who had been employed by a party were examined. There can be no doubt that, to call an advocate in the cause as a witness is most objectionable, and should be avoided whenever possible; but we apprehend that a judge has no right *in point of law* to reject him; although, if the court above think that under all the circumstances any practical mischief has resulted from the reception of such a witness, they may, in their discretion, grant a new trial, if not as matter of right, at least as matter of judgment.

§ 186. These views are confirmed by the case of *Cobbett* v. *Hudson* (*i*). After the 14 & 15 Vict. c. 99, had allowed parties to a suit to be witnesses, inasmuch as all persons who sue or defend in a court of justice may, if so disposed, conduct their own causes without legal assistance, it became clear that the question whether a person who so conducts his own cause can also be a witness in it, must soon present itself for decision;

(*d*) 1 Ventr. 197.
(*e*) 11 Ho. St. Tr. 459.
(*f*) Page 385.
(*g*) Sty. 449.
(*h*) 1 Keb. 505. See also Mar. 83, pl. 136.
(*i*) 1 Ell. & Bl. 11.

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and the point at length arose in the case referred to. At the trial before Lord Campbell, C. J., the plaintiff, who sued in formâ pauperis, conducted his cause in person. The Lord Chief Justice told him that if he addressed the jury as an advocate, he could not be permitted to give evidence as a witness. The plaintiff elected to act as advocate, and not as a witness. A verdict having been given for the defendant, a rule was obtained for a new trial, on the ground that the above ruling was erroneous. This rule was argued before Lord Campbell, C. J., Coleridge, Wightman and Erle, JJ., and after time taken to consider, the following judgment was delivered by Lord Campbell: "We are of opinion that the rule for a new trial should be made absolute, on the ground that the plaintiff was improperly told that he could not be permitted to address the jury as his own advocate, without agreeing to waive his right to be examined as a witness in his own behalf. We are fully aware of the inconvenient consequences which must follow from a party to a suit being alternately during the trial advocate and witness; and we express our strong disapprobation of such a practice. But we cannot say that the judge at nisi prius has at present sufficient authority to prevent it. Before the recent statute (14 & 15 Vict. c. 99), the party had a right to conduct his own cause in person, although he could not be his own witness; and by that statute (sect. 2) he is rendered 'competent and compellable to give evidence' as a witness, without any abridgment of his former right to act as his own advocate. We must be careful that we do not abridge the rights conferred on suitors by common or statute law, while we are acting merely on views of policy and expediency, with respect to which different judges may form different opinions. It was stated, at the trial, that verdicts had several times been set aside, on the sole ground that the same person had been permitted to act as advocate and

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to be examined as a witness; but when the cases alluded to are examined, it will be found that the rigid rule contended for is not laid down in them. In *Stones* v. *Byron*, 4 D. & L. 493, upon a trial before the sheriff, an attorney having addressed the jury as advocate for the plaintiff and then been examined as a witness for him, Patteson, J., observed: 'I must say that I do not think that such a course of proceeding is proper, or consistent with the due administration of justice. It seems to me, therefore, that his evidence ought not to have been received, and having been received, that there ought to be a new trial.' But there the evidence had been received after the defendant's case was closed, and after the plaintiff's advocate had replied; and this irregularity, testifying that the undersheriff who presided was unduly influenced, appears to have been a ground of the decision. In *Deane* v. *Packwood*, 4 D. & L. 395, note (*b*) (very shortly reported in a note to *Stones* v. *Byron*, 4 D. & L. 393), which was likewise a trial before the sheriff, the plaintiff's attorney, after addressing the jury as advocate, was examined as a witness; and Erle, J. granted a new trial on this ground, but without laying down a general rule on the subject, or professing to extend the authority of *Stones* v. *Byron*. In *R.* v. *Brice*, 2 B. & A. 606, it was laid down that, on the trial of an indictment for perjury, the prosecutor shall not be admitted to address the jury; the court observing: 'the prosecutor may be, and generally is, a witness; and it is very unfit that he should be permitted to state, not upon oath, facts to the jury which he is afterwards to state to them on his oath.' But there the king was to be considered the party; and the private prosecutor had no right to address the jury, even if he waived his right to be examined as a witness. It was said, at the trial of this cause, that since the late Evidence Act (14 & 15 Vict. c. 99) passed, it had been decided, both before the chief justice of the Common Pleas and the chief baron of the Exchequer, that a

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party cannot he permitted to act as his own advocate and to be examined as his own witness: but, after diligent inquiry, no such decision can he discovered. The validity of the rule contended for, is rested on the authority of the judge at Nisi Prius, to regulate the procedure in a way that may be most conducive to the investigation of truth; and the instance was referred to of an order for the witnesses to leave the court, with an intimation that any witness, who remains in court or returns into court before he is called, shall not be examined. But the judge must be governed by established practice and the general rules of law. With respect to ordering the witnesses out of court, although this is clearly within the power of the judge, and he may fine a witness for disobeying this order, the better opinion seems to have been that his power is limited to the infliction of the fine, and that he cannot lawfully refuse to permit the examination of the witness; see *Cook* v. *Nethercote*, 6 C. & P. 741; *Thomas* v. *David*, 7 *Id.* 350; *R.* v. *Colley*, 1 Moo. & Mal. 329. We may hope that, without any positive rule against a party addressing the jury and being examined as a witness on oath on his own behalf, a practice so objectionable is not likely to spring up; for it is not only contrary to good taste and good feeling, but, as it must be revolting to the minds of the jury, it will generally be injurious to those who attempt it. In such a case as the present there is not the smallest colour for resorting to it; for the plaintiff, suing in formâ pauperis, had counsel assigned to him, who must be supposed to have been ready to support at the trial the certificate he had given, that the plaintiff had a good cause of action; and an offer was freely made to the plaintiff to postpone the trial till the attendance of this gentleman could be procured. If the practice does gain ground to a degree seriously injurious to the due administration of justice, the legislature may interfere, or the judges, under the authority vested in them, may make a general order

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whereby it may be prevented in future. But, as the law now stands, we think the judge at Nisi Prius exceeded his authority in refusing to allow the plaintiff to be examined as a witness on oath after addressing the jury as an advocate; and that upon a new trial he must be permitted to do both if he shall be so inclined." The rule for a new trial was accordingly made absolute.

4. Jurors.

§ 187. Next as to the case of jurors. It is fully settled that a juryman may be a witness for either of the parties to a cause which he is trying (*k*). And it is essential that this should be so, as otherwise persons in possession of valuable evidence would be excluded if placed on the jury panel, and might even be fraudulently placed there for the purpose of excluding their testimony. But here an important distinction must be borne in mind, viz. the difference between general information and particular personal knowledge. A writer on this subject states the rule thus (*l*). "It is now perfectly settled that a juror cannot give a verdict founded on his own private knowledge; for it could not be known whether the verdict was according to or against the evidence; it is very possible that the private grounds of belief might not amount to legal evidence. And if such evidence were to be privately given by one juror to the rest, it would want the sanction of an oath, and the juror would not be subject to cross-examination. If, therefore, a juror know any fact material to the issue, he ought to be sworn as a witness, and is liable to be cross-examined; and if he privately state such facts it will be a ground of motion for a new trial." This dis-

(*k*) 3 Blackst. Com. 375; Trials per Pais, 384; 2 Hawk. P. C. c. 46, s. 17; 1 Lill. Pract. Reg. 552; 2 *Id.* 126; *R.* v. *Reading*, 7 Ho. St. Tr. 267; *R.* v. *Heath*, 18 *Id.* 123; *Bennet* v. *The Hundred of Hartford*, Sty. 233; *Fitzjames* v. *Moys*, 1 Sid. 133; *Anon.*, 1 Salk. 405; *R.* v. *Rosser*, 7 C. & P. 648; *Manley* v. *Shaw*, Car. & M. 361.

(*l*) 1 Stark. Ev. 542, 3rd Ed.; *Id.* 816, 4th Ed. See acc. 1 Lill. Pract. Reg. 552; 2 *Id.* 126; 6 Ho. St. Tr. 1012 (note); 18 *Id.* 123.

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tinction is well illustrated by the following cases. In *R.* v. *Rosser* (*m*), the accused was indicted for stealing in a dwelling-house a watch and seals, alleged to be of the value of 7*l.*; and a witness for the prosecution having sworn that the property in his opinion was worth that sum, the jury, after the summing-up, inquired if they were at liberty to put a value on the property themselves. To this Vaughan, J., answered, "If you see any reason to doubt the evidence on the subject, you are at liberty to do so. Any knowledge you may have on the subject you may use. Some of you may perhaps be in the trade." And Parke, B., added, "If a gentleman is in the trade, he must be sworn as a witness. That general knowledge which any man can bring to the subject may be used without; but if it depends on any knowledge of the trade the gentleman must be sworn." And in *Manley* v. *Shaw* (*n*), which was an action against the acceptor of a bill of exchange, after the handwriting of the defendant had been proved, one of the jury, on looking at the bill, said that the stamp was a forgery, and stated to the court that several respectable houses had been found in possession of forged stamps to a great amount: on which Tindal, C. J., said, "The gentleman of the jury who says that the stamp is a forgery, should be sworn as a witness to give evidence to his brother jurors before they can act upon his opinion:" and told the juryman that if he thought proper he might be sworn and examined as a witness to prove the forgery. The juryman declining this, and there being no other evidence, the judge directed a verdict for the plaintiff.

5. Judges.

§ 188. Lastly, with respect to judges. Notwithstanding the language attributed to Gascoigne, C. J., on this

(*m*) 7 C. & P. 648.

(*n*) Carr. & M. 361.

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subject (*o*), it is clearly no objection to the competency of a witness that he is named as a judge in the commission under which the court is sitting (*p*). But a distinction has been taken with respect to the judge who is actually trying the cause (*q*); and it is observed that on the trial of one of the regicides in 1660, when two of the members of the commission came down from the bench to give evidence, they did not return to it until after that trial was concluded (*r*): this however may have been matter of taste and feeling. When a nobleman is tried by the House of Lords, any of the peers is a competent witness (*s*); but then, on such occasions each peer sits in the capacity both of judge and juryman. The objection, if it be one, to the competency of the presiding judge at the trial rests, not on the ground of his having to form a judgment on the case—this argument would exclude the juryman—but on one analogous to that urged against the competency of counsel, viz. the difficulty which the jury would have in discriminating between his testimony, and his direction to them on matters of law or his comments on the evidence given by other witnesses; to which the same answer presents itself, namely, that the presiding judge may be the sole depository of important evidence, the relevancy of which to the issue raised cannot even be suspected until the case is gone into. Besides, the litigant parties have no voice whatever in the selection of the judge, and cannot challenge him, either peremptorily or for cause. Sir John Hawles, in the observations to which we have already referred, says (*t*), "Every man

(*o*) P. 7 H. IV. 41 A., and see Plowd. 83.

(*p*) 2 Hawk. P. C. c. 46, s. 17; Bac. Abr. Ev. (A. 2); *R.* v. *Hacker*, J. Kely. 12; Observations of Sir J. Hawles, 11 Ho. St. Tr. 459.

(*q*) Tayl. Ev. § 1244, 4th Ed.; 1 Greenl. Ev. § 364, 7th Ed.

(*r*) *R.* v. *Hacker*, J. Kely. 12.

(*s*) *Lord Stafford's case*, 7 Ho. St. Tr. 1384, 1458, 1552; *Earl of Macclesfield's case*, 16 *Id.* 1252, 1391.

(*t*) 11 Ho. St. Tr. 459.

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knows that a judge in a civil matter tried before him has been enforced to give evidence, for in that particular a judge ceases to be a judge, and is a witness; of whose evidence the jury are the judges, though he after re-assume his authority, and is afterwards a judge of the jury's verdict." There can be no doubt, however, that if a judge gives evidence he must be sworn, and be examined and cross-examined like any other witness.

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Chapter III.

GROUNDS OF SUSPICION OF TESTIMONY.

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Exceptions to the credit of witnesses.

§ 189. "Exceptions to the credit of the witness," says Sir Matthew Hale (*a*), "do not at all disable him from being sworn, but yet may blemish the credibility of his testimony, and in such case the witness is to be allowed, but the credit of his testimony is left to the jury, who are judges of the fact, and likewise of the probability or improbability, credibility or incredibility of the witness and his testimony, and these exceptions are of that great variety and multiplicity, that they cannot easily be reduced under rules or instances." They have been immensely increased in consequence of the statutes 6 & 7 Vict. c. 85, 14 & 15 Vict. c. 99, and 16 & 17 Vict. c. 83; as interest in the event of the cause and infamy of character, which before those statutes constituted objections to the *competency* of a witness, may now be urged to the jury as objections to his *credit* (*b*).

Interests and motives producing false-

§ 190. "Witnesses," says Sir Edward Coke (*c*), "ought to come to be deposed untaught, and without

(*a*) 2 Hale, P. C. 276, 277.

(*b*) On the value of human testimony in general, see Introduction, pt. 1.

(*c*) 4 Inst. 279.

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instruction, and should wish the victory to the party that right hath, and that justice should be administered: and should say from his heart, 'Non sum doctus, nec instructus, nec curo de victoriâ, modo ministretur justitia'" (*d*). This truly happy frame of mind is, however, not always met with, for there is no possible interest or motive which may not, under some state of circumstances, taint the testimony of man with falsehood or misrepresentation. Much of course depends on the physical constitution, and the character, moral and religious, of the individual. Some persons seem almost above any degree of temptation; others who resist long succumb at last; others yield on slight pressure; and some scarcely wait to be tempted. To enumerate these interests or motives would be to enumerate the springs of human action (*e*); but the following are among the principal. hood and misrepresentation.

§ 191. First, then, of *pecuniary* interest, as being the most obvious. This was formerly a ground of incompetency (*f*); and in order to estimate its weight, the condition and circumstances in life of the witness should, if practicable, be ascertained and taken into consideration. The temptation which poverty affords to perjury needs little comment. 1. Pecuniary interest.

> ". . . . . Jures licet et Samothracum
> Et nostrorum aras; contemnere fulmina pauper
> Creditur atque deos, dîs ignoscentibus ipsis" (*g*).

> "En grande pauvreté n'y a pas grande loyauté" (*h*).

Expressions like these however are, if understood literally, libels on human nature; and the rich and great are subject to temptations of their own (*i*).

(*d*) See acc. Devotus, Inst. Canon. lib. 3, tit. 9, § XVII. 5th Ed.

(*e*) See further on this subject, 5 Benth. Jud. Ev. bk. 10, ch. 2 *et seq.*

(*f*) *Suprà*, ch. 2.

(*g*) Juvenal. Sat. 3, vv. 144 *et seq.*

(*h*) Bonnier, Traité des Preuves, §§ 190 & 320.

(*i*) *Infrà*.

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2. Relations between the sexes.

§ 192. Secondly, a powerful source of false testimony is to be found in the relations between the sexes. Previous to the 16 & 17 Vict. c. 83, husband and wife were incompetent witnesses for or against each other in most civil, as they still are in most criminal, cases (*k*)—an exclusion based not so much on supposed affection between them, as on an artificial unity of person established by the policy of law. But the existence of any other relation of this kind—such as that of a man with his kept mistress, &c.—only goes to the credit of a witness. Whether a man's wife or his kept mistress is most likely to bear false testimony in his favour, depends on circumstances. In the one case there is by law an almost indissoluble unity of person, accompanied most usually by a unity of interest, but still where affection may or may not exist: in the other the relation probably originated in at least some degree of affection on the part of the man; but then he may at any moment put an end to it, which in many instances would deprive a woman of the means of subsistence, whose reputation has been forfeited.

3. Other domestic and social relations.

§ 193. Thirdly, the interest arising out of other domestic and social relations. This may have its source either in affection, desire of revenge, or a dread of oppression or vexation. In the laws of some countries, blood relationship within certain degrees has been made a ground of incompetency (*l*); and friendship or enmity with one of the litigant parties may justly cause evidence to be looked on with suspicion (*m*). Nor do even these supply the most efficient motives to falsehood. A parent in his family, a military, ecclesiastical, official, or feudal superior may often, without exposing himself to danger,

(*k*) See the preceding chapter.

(*l*) Dig. lib. 22, tit. 5, ll. 4 and 5; Domat, Lois Civiles, Part. 1, liv. 3, tit. 6, sect. 3, § X.

(*m*) Dig. lib. 22, tit. 5, l. 3; lib. 48, tit. 18, l. 1, §§ 24 & 25; Domat, in loc. cit. §§ XI. and XII.

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or even shame, inflict mischief almost boundless on those who are subject to his authority. "Idonei non videntur esse testes, quibus imperari potest, ut testes fiant," said the Roman law (*n*). Among us, however, this only goes to the credit of the witness.

4. Desire to preserve reputation.

§ 194. Fourthly. Perjury is often committed to preserve the reputation of the swearer. An example of this may be seen in those cases, and they are of frequent occurrence, where the person called as a witness has, on some former occasion, given a certain account of the transaction about which he is interrogated, and is afraid or ashamed to retract that account.

5. Interest in or sympathy for others.

§ 195. Fifthly. The last source of bias which we shall notice is the feeling of interest in or affection for others. A man who belongs to a body, or is a member of a secret society, governed by principles unknown to the rest of mankind, comes before the tribunal loaded with the passions of others in addition to his own (*o*). To this head belong those cases, where mendacious evidence is given through the sympathy generated by a similarity of station in life, or a coincidence of social, political, or religious opinions, and the like. This is very frequently found in witnesses from the higher walks of society; and it is not easy for a hostile advocate to deal with such witnesses:—for although it is evident they are misleading the tribunal, their station and demeanour alike render it unsafe to speak of them as perjured (*p*).

(*n*) Dig. lib. 22, tit. 5, l. 6.

(*o*) Introd. pt. 1, § 20.

(*p*) "Si deficietur numero" (scil. testium) "pars diversa, paucitatem; si abundabit, conspiratione; si humiles producet, vilitatem; si potentes, gratiam oportebit incessere." Quintil. Inst. Orat. lib. 5, c. 7.

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PART II.

REAL EVIDENCE.

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§ 196. "REAL EVIDENCE"—the evidentia rei vel facti of the civilians (*a*)—means all evidence of which any object belonging to the class of *things* is the source; *persons* also being included in respect of such properties as belong to them in common with things (*b*). Thus where an offence or contempt is committed in presence of a tribunal, it has direct real evidence of the fact. So formerly, on an appeal of mayhem, the court would in some cases inspect the wound, in order to see whether it were a mayhem or not (*c*); and if the mayhem was obvious, such as striking off an arm, &c., the proof was both real and direct. But in most instances real evidence is only circumstantial in its nature (*d*), i. e. evidence from which the existence of the principal fact is inferred by a process of reasoning.

Real evidence.

Sometimes direct.

Usually circumstantial.

§ 197. Real evidence is either *immediate* or *reported* (*e*). *Immediate* real evidence is where the thing which is the source of the evidence is present to the senses of the tribunal (*f*). This is of all proof the most satisfactory and convincing—"Cum adsunt testimonia rerum, quid opus est verbis" (*g*)—but, as already stated, it is rarely available, at least with respect to principal facts. And so

Immediate real evidence.

Sometimes exacted by law.

(*a*) Mascard. de Prob. Quæst. 8; Calv. Lexic. Jurid.; and the judgment of Lord Stowell in *Evans* v. *Evans*, 1 Hagg. C. R. 105.

(*b*) 3 Benth. Jud. Ev. 26; 1 *Id.* 53.

(*c*) 28 Ass. pl. 5; 22 *Id.* pl. 99; 37 *Id.* pl. 9. See also Mascardus de Prob. Quæst. 8, n. 10.

(*d*) See 1 Benth. Jud. Ev. 55; 3 *Id.* 33.

(*e*) 3 Benth. Jud. Ev. 33.

(*f*) Where the production of real evidence in open court would be indecent, the jury may inspect it in private; as was done in the case before Lord Hale, where a man successfully defended himself against a charge of rape by shewing that he had a frightful rupture, 1 Hale, P. C. 635, 636. See also Bonnier, Traité des Preuves, § 77.

(*g*) 2 Bulst. 53. On this subject Mascardus (de Prob. Quæst. 8, n. 20), and Bonnier (Traité des Preuves, § 51) quote the well-known lines from the Ars Poetica of Horace—

"Segniùs irritant animos demissa per aurem,
Quàm quæ sunt oculis subjecta fidelibus."

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sensible is the law of its transcendent value, that in some cases the production of certain species of real evidence is peremptorily exacted, to the exclusion of all substitutes. Thus, a coroner's inquest to ascertain the cause of the death of a person who has died suddenly, must be held super visum corporis (*h*). So, when a fine was levied, the parties were required by the ancient statute 18 Edw. 1, st. 4, Modus levandi fines, to appear personally before the justices, in order that it might be discerned by them if they were of full age and good memory, &c. (*i*). And the same seems to hold in the case of a recognizance (*k*); which is always expressed to be entered into on the personal appearance of the party before the justice who takes it (*l*). On this principle, in a great degree, rests the just and sound rule of English judicature, that the evidence of witnesses must in general be given by them personally in open court—the real evidence afforded by their demeanour being one of the most powerful securities against perjury and fraud.

Sometimes by practice.

There are likewise instances where the production of real evidence is exacted by practice. Thus on an indictment for larceny, if the stolen property has been found, the court usually insists on its being produced before the jury; although, when the goods stolen are of a perishable nature, this is of course frequently impossible; neither would it be required when likely to be inconvenient or offensive, as where flesh stolen is in an advanced state of decomposition, &c. But real evidence is often produced at trials, when it is not exacted by any

Often produced when not exacted.

(*h*) 1 Blackst. Com. 348; 4 *Id.* 274; Holt, 167; 21 Edw. 4, 70, 71; 6 & 7 Vict. c. 83, s. 2.

(*i*) For this reason a fine levied by an idiot, lunatic, &c. was good, for the law presumed that the judge would not allow the party to levy it unless he were of sound mind. See *Beverley's case*, 4 Co. 123 b; *Mansfield's case*, 12 *Id.* 124; and the argument in *Molton* v. *Camroux*, 2 Exch. 487.

(*k*) *Beverley's case*, 4 Co. 124 a. Semble per Parke, B., in *Molton* v. *Camroux*, 2 Exch. 487, 493.

(*l*) See the precedents in Dalton's Country Justice, Burn's Justice of the Peace, &c.

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rule either of law or practice. Valuable evidence of this kind is sometimes given by means of accurate and verified models (*m*), or by what is technically termed a "view," i. e. a personal inspection by some of the jury of the *locus in quo*—a proceeding allowed in certain cases by the common law (*n*), and much extended by the statutes 4 Anne, c. 16, s. 8; 6 Geo. 4, c. 50, s. 23, and 15 & 16 Vict. c. 76, s. 114. But the law on this subject has received an important addition by the 17 & 18 Vict. c. 125, s. 58, which enacts, that "either party shall be at liberty to apply to the court or a judge for a rule or order for the inspection by the jury, or by himself, or by his witnesses, of any real or personal property, the inspection of which may be material to the proper determination of the question in dispute; and it shall be lawful for the court, or a judge, if they or he think fit, to make such rule or order, upon such terms as to costs and otherwise as such court or judge may direct: Provided always, that nothing herein contained shall affect the provisions of the 'Common Law Procedure Act, 1852,' or any previous act, as to obtaining a view by a jury: Provided also, that all rules and regulations now in force and applicable to the proceedings by view under the last-mentioned act shall be held to apply to proceedings for inspection by a jury under the provisions of this act, or as near thereto as may be." Views and models.

§ 198. *Reported* real evidence is, where the thing which is the source of the evidence is not present to the senses of the tribunal, but the existence of it is conveyed to them through the medium of witnesses or documents (*o*). This sort of proof is, from its very nature, less satisfactory and convincing than immediate real *Reported* real evidence. Infirmities of.

(*m*) It is the same in France. See Bonnier, Traité des Preuves, § 55.

(*n*) F. N. B. 123 C., 128 B., 184 F.; 2 Salk. 665; 2 Wms. Saund. 44 a, note 4.

(*o*) 3 Benth. Jud. Ev. 33.

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evidence. "To the reporting witness indeed, if his report be true, it was so much immediate, so much pure real evidence: but to the judge it is but reported real evidence. The distinction is far from being a purely speculative one: practice requires to be directed by it. Reported real evidence is analogous to hearsay evidence, and labours more or less under the infirmities which attach to that modification of personal evidence, compounded of circumstantial evidence and direct,—of real evidence, and ordinary personal evidence (evidence given in the way of discourse): it unites the infirmities of both. The lights afforded, or said to have been afforded, by the real evidence, are liable to be weakened in intensity, and altered in colour, by the medium through which it is transmitted" (*p*).

Circumstantial real evidence.

§ 199. Circumstantial real evidence partakes of the nature of all other circumstantial evidence in this, that the persuasions or inferences to which it gives rise are sometimes *necessary* and sometimes only *presumptive*.

Value and dangers of, chiefly conspicuous in criminal proceedings.

And as it is in criminal proceedings that the value and dangers of this mode of proof are chiefly conspicuous, we shall devote the rest of this chapter to a consideration of its probative force and infirmative hypotheses in those proceedings.

Infirmative facts, or hypotheses.

By "*infirmative* fact" or "hypothesis" is meant any fact or hypothesis which, while insufficient in itself either to disprove or render improbable the existence of a principal fact, yet tends to weaken or render *infirm* the probative force of some other fact which is evidentiary of it (*q*).

Necessary inferences from circumstantial real evidence.

§ 200. In the case of *necessary* inferences, properly so called, there can be no infirmative facts or hypo-

(*p*) 3 Benth. Jud. Ev. 34.

(*q*) See 3 Benth. Jud. Ev. 14. "Socrates, who, professing to affirm nothing, but to *infirm* that which was affirmed by another, hath exactly expressed all the forms of objection, fallacy and redargution:" Bac. Adv. Learn. Book 2.

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theses. As instances—where a female was found dead in a room, with every sign of having met a violent end, the presence of another person at the scene of action was demonstrated, by the bloody mark of a *left* hand visible on her *left* arm (*r*). And where a man was found killed by a bullet, with a discharged pistol lying beside him, the hypothesis of suicide from that pistol was negatived, by proof that the bullet which caused his death was too large to fit it (*s*).

Presumptive inferences from circumstantial real evidence.

§ 201. Cases of this kind are, however, of rare occurrence, and when they do present themselves the facts speak too plainly to need comment. In the vast majority of instances, the inference to which a piece of circumstantial real evidence gives rise is only *probable* or *presumptive*. On charges of homicide, for instance, the nature of the weapon with which the fatal blow was given, is of the utmost importance in determining whether malice existed or ought to be presumed; on charges of rape, the clothes worn by the female at the time of the alleged outrage, torn and stained, or untorn and unstained, as the case may be, afford a strong presumption for or against the charge. But physical coincidences and dissimilarities, often of a most singular kind, frequently lead to the discovery of the perpetrators of offences, or establish the innocence of parties wrongly accused of them. Several instances of the former are given in Starkie on Evidence (*t*), Thus, in a case of burglary,—where the thief gained admittance into the house by opening a window with a penknife, which was broken in the attempt,—part of the blade was left sticking in the window frame, and a broken knife, the frag-

Physical coincidences and dissimilarities.

(*r*) Case of *Norkott* and others, 10 Harg. St. Tr. App. No. 2, p. 29.

(*s*) Theory of Pres. Proof, App. case 2; Wills, Circumst. Ev. 80, 3rd Ed. See other instances in Beck's Med. Jurispr. p. 591, 7th Ed.

(*t*) 1 Stark. Ev. 562, 3rd Ed.; 844, 4th Ed.

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ment of which corresponded with that in the frame, was found in the pocket of the prisoner. So, where a man was found killed by a pistol-shot, and the wadding in the wound consisted of part of a ballad, the corresponding part of which was found in the pocket of the prisoner. In another case of murder, a patch on one knee of the prisoner's breeches, corresponded with an impression found on the soil close to the place where the murdered body lay. In a case of robbery, the prosecutor, when attacked, struck the robber on the face with a key, and a mark of a key with corresponding wards was visible on the face of the prisoner. Mascardus also relates an instance where an inclosed ground set with fruit trees was broken into by night, and several fruits eaten, the rinds and fragments of some of which were found lying about. On examining these, it appeared that the person who ate them had lost two front teeth, which caused suspicion to fall on a man in the neighbourhood who had lost a corresponding number, and who on being taxed with the theft confessed his guilt (*u*). In some cases, also, the fact of the accused being left-handed becomes an adminiculum of evidence against him, i. e. when surrounding circumstances show that the offence must have been perpetrated by a left-handed person (*x*). Few things have led to the detection of more forgeries than the Anno Domini water-mark on paper; and in one old case a criminal design was detected, by a letter purporting to have come from Venice being written on paper made in England (*y*).

Inculpative effect of.

Strong, however, as coincidences and dissimilarities of this nature undoubtedly are, we must be careful not to attribute to them, when standing alone, a conclusive effect in all cases. Just let it be remembered that the

(*u*) Mascard. de Prob. Quæst. 8, n. 28.

(*x*) See the case of *William Richardson*, Appendix, No. I.; and *Patch's case*, Beck, Med. Jurispr. 583, 7th Ed.

(*y*) Moore, 817.

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men who were found in possession of the broken knife, and the fragment of the ballad (the latter especially), might have picked them up where they had been thrown away by the real criminals; that the person the print of whose knee was visible on the soil near the murdered corpse, might have been a passer by who knelt down to see if life were really extinct, or to render assistance to the sufferer; that the having lost front teeth, or being left-handed, are not very uncommon, add to which that some persons are what is called "ambidextrous," i. e. use both hands with equal facility (*z*); that the Anno Domini water-mark on paper is by no means infallible, the year being often anticipated by the manufacturer (*a*); that, in the present age of the world at least, a person writing at Venice on a sheet of paper brought or imported from England is scarcely improbable; and that, even the impression made on the face by the key, might have been caused by a blow from the same or a similar key at some other time (*b*), or might possibly be a natural mark. An excellent instance of how closely the propensity to run after coincidences ought to be watched, is presented by the case of one Fitter, who was indicted at the Warwick assizes of 1834 for the murder of a female. He was a shoemaker; and his leathern apron having on it several circular marks, made by paring away superficial pieces, it was supposed that they had been removed as containing spots of blood; it was, however, satisfactorily proved in his defence, that he had cut them off for plasters for a neighbour (*c*).

Exculpative effect of.

It is when taken in connexion with other evidence, that physical coincidences and dissimilarities are chiefly valuable, when they certainly press with fearful weight on a criminal. But if their presence is powerful for convic-

(*z*) Tayl. Med. Jurisp. 230, 3rd Ed.

(*a*) Wills, Circ. Ev. 29 and 114, 3rd Ed.

(*b*) Goodeve, Evid. 29.

(*c*) Wills, Circ. Ev. 128, 3rd Ed.

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tion, their absence is at least equally powerful for exculpation. Sir Matthew Hale relates a remarkable instance of a man who rebutted a charge of rape by shewing that he laboured under a frightful rupture, which rendered sexual intercourse almost, if not absolutely, impossible (*d*). This is, however, an old case, and should a similar one arise, the perfection which the manufacture of trusses has attained in modern times, would be an infirmative circumstance not to be overlooked.

Infirmative hypotheses affecting real evidence.

§ 202. The infirmative hypotheses affecting real evidence, however, present a subject of too much importance to be dismissed with a cursory notice. Considered in the abstract, real evidence, apparently indicative of guilt, may be indebted for its criminative shape to *accident, forgery, or the lawful action of the accused.* Here it must not be forgotten, that sometimes the most innocent men cannot explain or give any account whatever of facts which seem to criminate them; and the experience of almost every person will supply him with instances of extraordinary occurrences, the cause of which is, to him at least, completely wrapt in mystery.

1°. Accident.

1°. Accident. The appearance of blood on the person of an accused or suspected person may be explained by his having, in the dark, come in contact with a bleeding body (*e*). Under this head come those cases where the appearance is the result of irresponsible agency: as where the act has been done by a party in a state of somnambulism (*f*);

Irresponsible agency.

(*d*) 1 Hale, P. C. 635, 636.

(*e*) See the case of *Jonathan Bradford*, Theory of Pres. Proof, Appendix, case 7. In Chambers's Edinburgh Journal also, for 11th March, 1837, there is a case where part of the evidence against a man charged with murder, consisted in his night-dress having been found stained with blood; a fact which he declared his inability to account for; and which was afterwards discovered to have been occasioned by his bedfellow having a bleeding wound, of which the prisoner was not aware.

(*f*) Cases of this nature have occurred. See Ray's Med. Jurisp. of Insanity, §§ 295, 297; Matth. de Criminib. Prolegomena, ch. 2,

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or as in the case of the unfortunate person in France, who was executed as a thief on the strength of a number of articles of missing silver having been found in a place to which he alone had access, and which were afterwards discovered to have been deposited there by a magpie (*g*).

§ 203. 2°. There is no subject in the whole range of judicial proofs which demands more anxious attention than the forgery of real evidence. It is in some degree analogous to the subornation of personal evidence, being an attempt to pervert and corrupt the nature of things or real objects, and thus force them to speak falsely (*h*). The presumption of guilt afforded by the detection of a forgery of real evidence is a different subject, and is based on the maxim, "Omnia præsumuntur contrà spoliatorem" (*i*)—its weight as an infirmative hypothesis respecting real evidence in general, being all that comes in question at present. 2°. Forgery of real evidence.

§ 204. Forgery of real evidence may have its origin in any of the following causes: 1. Self-exculpation. 2. The malicious intention of injuring the accused, or others. 3. Sport, or with the view of effecting some moral end.

§ 205. 1. Self-exculpative forgery of real evidence. 1. Self-exculpative forgery.

§ 13; and Taylor, Med. Jurisp. 789, 790, 4th Ed. Two men who had been hunting during the day slept together at night. One of them was renewing the chase in his dream, and imagining himself present at the death of the stag, cried out, "I'll kill him, I'll kill him!" The other, awakened by the noise, got out of the bed, and by the light of the moon beheld the sleeper give several stabs with a knife on that part of it which his companion had just quitted: Hervey's Meditations on the Night, note 35. Suppose a blow given in this way had proved fatal, and that the two men had been shewn to have quarrelled before retiring to rest!

(*g*) 3 Benth. Jud. Ev. 49; Bonnier, Traité des Preuves, § 647.

(*h*) 3 Benth. Jud. Ev. 50.

(*i*) *Infrà*, bk. 3, pt. 2, ch. 2.

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Suspected person innocent in toto.

An excellent instance of the danger to be apprehended from this source is given by Sir Matthew Hale, in a passage which is very frequently quoted. After observing that the recent and unexplained possession of stolen property raises a strong presumption of larceny, he tells us of a case tried, as he says, before a very learned and wary judge, where a man was condemned and executed for horse stealing, on the strength of his having been found upon the animal the day it was stolen, but whose innocence was afterwards made clear by the confession of the real thief; who acknowledged that, on finding himself closely pursued, he had requested the unfortunate man to walk his horse for him while he turned aside upon a necessary occasion, and thus escaped (*j*). This species of forgery, however, is not confined to criminals. It sometimes happens that an innocent man, sensible that, though guiltless, appearances are against him, and not duly weighing the danger of being detected in clandestine attempts to stifle proof, endeavours to get rid of real evidence in such a way as to avert suspicion from himself, or even turn it on some one else. An extremely apt illustration is to be found in the Arabian Nights' Entertainments (*k*); where the body of a man who had died by accident in the house of a neighbour, was conveyed by him, under the apprehension of suspicion of murder in the event of the corpse being found in his house, into the house of another neighbour; who, finding it there, and acting under the influence of a similar apprehension, in like manner transmitted it to a third; who, in his turn, shifted the

By innocent person to avert suspicion.

(*j*) 2 Hale, P. C. 289. A similar conviction occurred in Surrey in 1827, but the fatal result was averted; *R.* v. *Gill*, Wills, Circ. Evid. 54, 3rd Ed. See also the case of *John Jennings*, Theor. of Presumptive Proof, App., case 1; and that of *Du Moulin*, Chambers's Edinb. Journ. for Oct. 28, 1837.

(*k*) 3 Benth. Jud. Ev. 36. The story alluded to is the well known one of the little hunchback.

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possession of the corpse to a fourth, with whom it was found by the officers of justice.

§ 206. 2. The forgery of real evidence may have been effected with the malicious purpose of bringing down suffering on an innocent individual. The most obvious instance is to be found in a case probably of more frequent occurrence than is usually supposed—namely, where stolen goods are clandestinely deposited in the house, room, or box of an innocent person, with the view of exciting a suspicion of larceny against him (*l*); and a suspicion of murder may be raised by secreting a bloody weapon in the like manner (*m*). In the case of *Le Brun* (*n*), who was accused of having murdered a lady of rank to whom he was servant, the officers of justice were charged by his advocates with having altered a common key, found in his possession, into a master key, in order to make it appear at the trial that he had a facility for committing the murder which he really did not possess. "Another remarkable example," says Mr. Arbuthnot, in the preface to his Reports of the Foujdaree Udalut of Madras (*o*), "is related in a Report recently published on the Wellicade Jail at Colombo in Ceylon. A man named Sellapa Chitty, of the class termed Nattacotie, reported wealthy, and largely en- 2. Malicious. Instances.

(*l*) In the preface to Mr. Arbuthnot's Reports of the Court of Foujdaree Udalut of Madras, Madras, 1851, p. xlii, is the following passage:—"In the annals of criminal justice in this country, instances of this species of forgery of real evidence are far from uncommon; it being a matter of notoriety that the clandestine placing of articles in the houses of accused persons, with a view to facilitate their conviction of a crime charged, is frequently resorted to by the native officers of police; while the production by the police from the houses of accused persons of articles, which are really their property, but are alleged to have been obtained by theft or robbery, is still more common."

(*m*) Theory of Presumptive Proof, App., case 10.

(*n*) 3 Benth. Jud. Ev. 60.

(*o*) Pages xli, xlii.

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gaged in trade, charged his neighbour and rival in business with causing the death of a Malabar Cooly by burning and otherwise ill-treating him; whereas it was found that the man had died a natural death, and that the prisoner, together with a relative and servant, had applied fire to several parts of the body, and deposited it on the premises of the accused; after which he gave notice to the police, and charged the innocent party with the murder. The case seemed clear, and the accused would have been tried on the capital charge, had not the medical gentleman on the inquest observed the unusual appearance of the burnt parts, and finally discovered that the injuries had all been inflicted on the body *after death*." The numerous cases that have occurred of persons inflicting wounds, often of a serious nature, on themselves, with the view of attaining some end (*p*)—in some instances for the purpose of enabling them to accuse hated individuals (*q*)—should induce tribunals to be more on their guard against the forgery of real evidence than they commonly are. And, as though no limit could be assigned to human wickedness, it is said that even suicide has been committed with a like view (*r*). The following application of this kind of forgery is likely to be made in countries, where the legitimate principles of evidence are either not well understood or not duly observed. We allude to the artifice of sending to the person whom it is desired to injure letters, in which either the mode of committing some

(*p*) See Tayl. Med. Jurisp. 254 *et seq.*, 3rd Ed.; Beck's Med. Jurisp. 32 *et seq.*, 7th Ed.

(*q*) Tayl. *in loc. cit.* In the Times Newspaper for January 30, 1847, will be found the case of a girl at Reading who, enraged against a man for having ceased to live with her, cut her throat severely, and then charged him with having attempted to murder her.

(*r*) We have somewhere read a case of that kind; and believe also that the French Jacobins were accused of having slain, with his consent, one of their number, in order to throw on the Royalists the imputation of having murdered him as a political enemy.

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crime is discussed, or allusion is made to a supposed crime already committed; and then procuring his arrest under such circumstances that the document may be found in his possession. E. g. "On such an occasion" (naming it), "my dear friend, you failed in your enterprize;" an enterprize (describing it by allusion) of theft, robbery, murder, treason: "on such a day, do so and so, and you will succeed" (*s*). "In this way," observes Bentham, "so far as possession of criminative written evidence amounts to crimination, it is in the power of any one man to make circumstantial evidence of criminality in any shape, against any other" (*t*).

With double object.

By force.

§ 207. It sometimes happens that real evidence is forged with the double motive of self-exculpation, and of inducing suspicion on a hated individual (*u*). And, lastly, it is to be observed, that this species of forgery may be accomplished by force as well as by fraud: e. g. three men unite in a conspiracy against an innocent person; one lays hold of his hands, another puts into his pocket an article of stolen property, which the third, running up as if by accident during the scuffle, finds there and denounces him to justice as a thief (*x*).

3. In sport, or for a moral end.

§ 208. 3. Forgery of real evidence committed either in sport or with the view of effecting some moral end. As an instance of this may be cited the story of the patriarch Joseph, who, with a view of creating alarm and remorse in the minds of his guilty brothers for their conduct towards him in early life, caused a silver cup to be privately hid in one of their sacks, and after they had gone some distance on their journey, had them arrested and brought back as thieves (*y*).

(*s*) 3 Benth. Jud. Ev. 44.

(*t*) *Id.*

(*u*) See the case of the Flemish parson in 5 Causes Célèbres, 442, Ed. Richer, Amsterd. 1773.

(*x*) 3 Benth. Jud. Ev. 39.

(*y*) Genesis, xliv. 2 *et seq.* See 3 Benth. Jud. Ev. 37, 52.

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3°. Lawful action of the accused.

§ 209. 3°. The other infirmative hypothesis affecting real evidence remains to be noticed; namely, that the apparently criminative fact may have been created by the accused in the furtherance of some lawful, or even laudable, design. This is best exemplified by those cases of larceny, where stolen property is found in the possession of a person who, knowing or suspecting it to have been stolen, takes possession of it with the view of seeking the true owner in order to restore it, or of bringing the thief to justice; but, before this can be accomplished, becomes himself the object of suspicion, in consequence of the stolen property being seen in his possession, or of false information being laid against him (*z*). In cases of suspected murder, also, stains of blood on the person or dress of the accused or suspected party, may have been produced by many causes (*a*), e. g. the slaughter of an animal, an accidental bleeding from the nose (*b*), a surgical operation (*c*), &c.

Real evidence fallacious as to *quality* of crime.

§ 210. Real evidence, while truly evidentiary of guilt in general, may be fallacious as to the *quality* of the crime. The recent possession of stolen property, for instance, standing alone, is deemed presumptive evidence of larceny, not of the accused having received the goods with a guilty knowledge of their having been stolen (*d*);

(*z*) The author has an impression of having seen a case on circuit, where a pedlar got drunk in a public-house, and a person present took possession of his pack with the view of returning it to him when sober, and was rewarded for his charity by an indictment for larceny.

(*a*) Quintil. lib. 5, c. 12.

(*b*) *Id.* lib. 5, c. 9.

(*c*) In the case of *William Shaw*, executed at Edinburgh in 1721 for the supposed murder of his daughter who had committed suicide, one of the facts which pressed against him was that his shirt was bloody, which was however caused by his having bled himself some days before, and the bandage becoming untied. Theory of Pres. Proof, App., case 8.

(*d*) *R.* v. *Densley*, 6 C. & P. 399; *R.* v. *Oddy*, 2 Den. C. C. 273, per Alderson, B. See *Reg.* v. *Langmead*, 1 Leigh & C. 427, 439.

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and there can be little doubt that many persons have been convicted and punished for the former offence, whose guilt consisted in the latter; while on the other hand justice has often failed the other way—a party guilty of receiving stolen property having been erroneously indicted for larceny (*e*). This imperfection in our criminal law was remedied by the 11 & 12 Vict. c. 46, s. 3, and 24 & 25 Vict. c. 96, s. 92, which allow counts for larceny to be joined with counts for receiving goods, knowing them to have been stolen (*f*). So where a person is found dead and plundered of his property, the subsequent possession of a portion of it may induce a suspicion of murder, against a party whose real crime was robbery (*g*).

Presumption of larceny from possession of stolen property.

Sometimes shifts the burthen of proof.

§ 211. There is one species of real evidence which deserves a more particular consideration, namely, the presumption of larceny, arising from possession by the accused of the whole or some portion of the stolen property. Not only is this presumptive evidence of delinquency when coupled with other circumstances; but even when standing alone it will in many cases raise a presumption of guilt, sufficient to cast on the accused the onus of shewing that he came honestly by the stolen property, and in default of his so doing, it will warrant the jury in convicting him as the thief. This presumption is not only subject to the infirmative hypotheses attending real evidence in general; but, from its constant occurrence, and the obvious danger of acting indiscriminately upon it, it has, as it were, attracted the attention of judges, who have endeavoured to impose some practical limits to its operation, where it constitutes the *only* evidence against the accused. And, first, it is clearly established that in order to put the accused on

Possession must be *recent*.

(*e*) See *R.* v. *Collier*, 4 Jurist, 703.

(*f*) See also 14 & 15 Vict. c. 100, s. 12.

(*g*) See *R.* v. *Downing*, Wills, Circ. Evid. 137, 3rd Ed.

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his defence, his possession of the stolen property must be *recent* (*h*); although what shall be deemed recent possession must be determined by the nature of the articles stolen—i. e. whether they are of a nature likely to pass rapidly from hand to hand; or of which the accused would be likely, from his situation in life, or vocation, to become innocently possessed (*i*). A poor man, for instance, might fairly be called to account for the possession of articles of plate, jewels, or rare and curious books, after a much longer time than if the property found on him had consisted of clothes, articles of food suitable to his condition, tools proper for his trade, &c. In the first reported case on this subject (*k*), Bayley, J., directed an acquittal, because the only evidence against the prisoner was that the stolen goods (the nature of which is not stated in the report) were found in his possession after a lapse of *sixteen* months from the time of the loss. Where, however, seventy sheep were put on a common on the 18th of June, but not missed till November, and the prisoner was in possession of four of them in October, and of nineteen more on the 23rd of November, the same judge allowed evidence of the possession of both to be given (*l*). In the subsequent case of *R.* v. *Adams* (*m*), where the prisoner was indicted for stealing an axe, a saw, and a mattock, and the whole evidence was that they were found in his possession *three* months after they were *missed*, Parke, J., directed an acquittal. And in a more recent case of *R.* v. *Cruttenden* (*n*), where a shovel which had been stolen was found about *six* or *seven* months after the theft in the house of the prisoner, who was not then at home,

(*h*) 2 Stark. Ev. 614, 3rd Ed.; 5 East, P. C. 657; *R.* v. *Cockin*, 2 Lew. C. C. 235; and the cases cited in the following notes.

(*i*) 2 Russ. on Crimes, 338, 4th Ed.; *R.* v. *Partridge*, 7 C. & P. 551; *R.* v. *Cockin*, 2 Lew. C. C. 235, n.

(*k*) *Anon.*, 2 C. & P. 459.

(*l*) *R.* v. *Dewhirst*, 2 Stark. Ev. 614, note (*e*), 3rd Ed.

(*m*) 3 C. & P. 600.

(*n*) 6 Jur. 267, and MS.: Kent Sp. Ass. 1842.

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Gurney, B., held that, on this evidence alone, the prisoner ought not to be called on for his defence. In *R.* v. *Partridge* (*o*), however, where the prisoner was indicted for stealing two "ends" of woollen cloth, (i. e. pieces of cloth consisting of about twenty yards each,) which were found in his possession about *two* months after they were *missed;* on its being objected that too long a time had elapsed, Patteson, J., overruled the objection, and the prisoner was convicted. Afterwards, in *R.* v. *Hewlett* (*p*), a prisoner was indicted for stealing three sheets, the only evidence against him being, that they were found on his bed in his house three calendar months after the theft. On this it was objected by his counsel, on the authority of *R.* v. *Adams*, that the prisoner ought not to be called on for his defence; but Wightman, J., said, that it seemed to him impossible to lay down any definite rule as to the precise time which was too great to call on a prisoner to give an account of the possession of stolen property; and that although the evidence in the actual case was very slight, it must be left to the jury to consider what weight they would attach to it. The prisoner was acquitted. In *R.* v. *Cooper* (*q*), where a mare which had been lost on the 17th of December, was found in the possession of the prisoner between the 20th of June and the 22nd of July following, and there was no other evidence against him, Maule, J., held the possession not sufficiently recent to put him on his defence. In dealing with this subject, it is to be remarked that the probability of guilt is increased, by the coincidence in number of the articles stolen with those found in the possession of the accused, the possession of one out of a large number stolen, being more easily attributable to accident or forgery than the possession of all (*r*).

(*o*) 7 C. & P. 551.

(*p*) 3 Russ. on Crimes, 216, 4th Ed.: Salop Sp. Ass. 1843.

(*q*) 3 Car. & K. 318.

(*r*) 2 Russ. on Crimes, 339, note (*r*), 4th Ed.; per Erle, J.,

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And *exclusive*.

§ 212. But in order to raise this presumption legitimately, the possession of the stolen property should be *exclusive* as well as recent. The finding it on the person of the accused, for instance, or in a locked-up house or room, or in a box of which he kept the key, would be a fair ground for calling on him for his defence; but if the articles stolen were only found lying in a house or room, in which he lived jointly with others equally capable with himself of having committed the theft, or in an open box to which others had access, no definite presumption of his guilt could be made (*s*). An exception has been said to exist where the accused is the occupier of the house in which stolen property is found, who, it is argued, must be presumed to have such control over it as to prevent anything coming in or being taken out without his sanction. As a foundation for *civil* responsibility this reasoning may be correct; but to conclude the master of a house guilty of *felony*, on the double presumption, first, that stolen goods found in the house were placed there by him or with his connivance; and, secondly, supposing they even were, that he was the thief who stole them, there being no corroborating circumstances, is certainly treading on the very verge of artificial conviction (*t*).

Carried too far in practice.

§ 213. Indeed, there can be no doubt that, in practice, the legitimate limits of the presumption under consideration are sometimes overstepped. "Nothing," remarks Bentham, "can be more persuasive than the circum-

R. v. *Brown*, MS.: Kent Sum. Ass. 1851.

(*s*) 2 Stark. Ev. 614, 3rd Ed., note (*g*); Rosc. Crim. Ev. 19, 4th Ed.

(*t*) "Il y aurait injustice flagrante, à réputer complice d'un vol celui chez qui l'objet volé serait trouvé, ainsi qu'on le faisait à Rome pour la réparation civile du délit. Présumer la culpabilité, à raison des circonstances qui peuvent n'être que fortuites, c'est là une marche grossière, qui appartient à l'enfance du droit pénal." Bonnier, Traité des Preuves, § 675. See also Hume's Crim. Law of Scotland, vol. 1, p. 111.

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stance of possession commonly is, when corroborated by other criminative circumstances: nothing more inconclusive, supposing it to stand alone. Receptacles may be contained one within the other, as in the case of a nest of boxes: the jewel in a case; the case in a box: the box in a bureau; the bureau in a closet; the closet in a room; the room in a house; the house in a field. Possession of the jewel, *actual* possession, may thus belong to a half-a-dozen different persons at the same time: and as to *antecedent* possession, the number of possible successive possessors is manifestly beyond all limit"(*u*). It is in its character of a *circumstance* joined with others of a criminative nature, that the fact of possession becomes really valuable and entitled to consideration, whether it be ancient or recent, joint or exclusive. But, whatever the nature of the evidence, the jury must be morally convinced of the guilt of the accused, who is not to be condemned on any artificial presumption or technical reasoning, however true and just in the abstract.

Explanation of possession by the accused.

§ 214. When the case against the accused is sufficiently strong to warrant the calling on him for his defence, the credit due to any explanation he gives of the way in which the stolen property came into his possession, whether that explanation is supported by evidence or not, is altogether for the consideration of the jury. And here it is necessary to point attention to an important distinction. In *R.* v. *Crowhurst* (*x*), which was an indictment for larceny, Alderson, B., before whom the case was tried, thus directed the jury—"In cases of this nature you should take it as a general principle, that, where a man in whose possession stolen property is found, gives a reasonable account of how he came by it, as by telling the name of the person from

(*u*) 3 Benth. Jud. Ev. 39, 40. (*x*) 1 Car. & K. 370.

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whom he received it, and who is known to be a real person, it is incumbent on the prosecutor to shew that that account is false; but if the account given by the prisoner be unreasonable or improbable on the face of it, the onus of proving its truth lies on him. Suppose, for instance, a person were to charge me with stealing this watch, and I were to say I bought it from a particular tradesman, whom I name, that is primâ facie a reasonable account, and I ought not to be convicted of felony unless it is shewn that that account is a false one." This doctrine is confirmed by the cases of *R.* v. *Smith* (*y*) and *R.* v. *Harmer* (*z*). The subsequent case of *R.* v. *Wilson* (*a*) may at first sight seem at variance with it, but is not in reality; for, although in that case *R.* v. *Crowhurst* and *R.* v. *Smith* were cited, the decision of the court turned simply on the question, whether the whole evidence taken together was sufficient to justify a conviction.

(*y*) 2 Car. & K. 207.
(*z*) 2 Cox, Cr. Cas. 487.
(*a*) 1 Dearsl. & B. 157; 7 Cox, Cr. Cas. 310.

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PART III.

DOCUMENTS.

CHAPTER I.

DOCUMENTARY EVIDENCE IN GENERAL.

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Documents.

§ 215. THE remaining instruments of evidence are DOCUMENTS, under which term are properly included all material substances on which the thoughts of men are represented by writing, or any other species of conventional mark or symbol. Thus the wooden scores on which bakers, milkmen, &c. indicate by notches the number of loaves of bread or quarts of milk supplied to their customers; the old exchequer tallies (*a*), and such like, are documents as much as the most elaborate

(*a*) These tallies were used as acquittances for debts due to the crown, and for some other purposes. A piece of wood, about two feet long, was cut into a particular uneven form, and scored with notches of different sizes to denote different denominations of coin, the largest denoting thousands of pounds; after which came respectively hundreds, tens, and units, of pounds; while shillings and pence were designated by still smaller notches. The wood was then split down the middle, into two parts, so that the cut passed through the notches. One portion was given out to the accountant, &c., which was called the "tally;" the other was kept by the chamberlain, and called the "counterfoil." The irregular form of the tally, together with the natural inequalities in the grain of the wood, rendered fabrication extremely difficult. Tallies having been abolished, and receipts substituted by 23 Geo. 3, c. 82, and 4 & 5 Will. 4, c. 15, those in existence were destroyed as useless. A few have however been preserved in the Remembrancer's Office, with a view of which the author has been kindly favoured. See further on the subject of these tallies, Dialogns de Scaccario, lib. 1, c. 5; Madd. Hist. Exch. chap. 23, § 28; Gilb. Exch. chap. 9. Tallies are in use in France, and recognized by law there. Cod. Civil, Liv. 3, tit. 3, chap. 6, sect. 1, § 3, Art. 1333; Bonnier, Traité des Preuves, §§ 614—616, & 335.

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deeds. In some instances, no doubt, the line of demarcation between documentary and real evidence seems faint; as in the case of models or drawings, which clearly belong to the latter head, but differ from that which we are now considering in this, that they are *actual*, not *symbolical*, representations.

Necessarily come to the cognizance of tribunals through human testimony.

How obtained when wanted for evidence.

When in possession of the opposite party.

When in possession of a third party.

§ 216. Documents, being inanimate things, necessarily come to the cognizance of tribunals through the medium of human testimony; for which reason some old authors have denominated them *dead* proofs (probatio mortua), in contradistinction to witnesses, who are said to be *living* proofs (probatio viva) (*b*). When documents which are wanted for evidence are in the possession of the opposite party, a notice to produce them should be served on him in due time before the trial, when, if he fails to produce them, derivative, or, as it is technically termed, "secondary" evidence of their contents may be given (*c*). When they are in the possession of a third party, he should be served with what is called a subpœna duces tecum, i. e. a summons to attend the trial as a witness and bring the documents with him. The person on whom such a subpœna has been served is bound to obey it, so far as attending the trial and bringing the documents with him; but, by analogy to the principles already explained (*d*), he will not be compelled to produce them if the disclosure might subject him to crimination, penalty, or forfeiture. So, a party will not be required to produce the muniments of title to his estate (*e*), nor will his attorney to whose care they have been entrusted (*f*); and in either case independent secondary evidence of their contents

(*b*) Bract. lib. 5, fol. 400 b; Co. Litt. 6 b.

(*c*) Bk. 3, pt. 2, ch. 3.

(*d*) *Suprà*, pt. 1, ch. 1.

(*e*) Tayl. Ev. §§ 428, 1318, 4th Ed.

(*f*) *Hibberd* v. *Knight*, 2 Exch. 11; *Doe* d. *Gilbert* v. *Ross*, 7 M. & W. 102; *Ditcher* v. *Kenrick*, 1 Car. & P. 161; *Volant* v. *Soyer*, 13 C. B. 231.

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Admissibility and construction of to be decided by the judge.

may be given (*g*). The admissibility of documents in evidence, as well as all preliminary questions of fact on which that admissibility depends (*h*), and their legal construction when received, are to be decided by the judge; other questions respecting them are for the jury.

Secondary significations of "Writing" and "Written Evidence."

§ 217. Although documentary evidence most usually presents itself in a written form, the terms "Writing" and "Written evidence" have obtained in law a secondary and limited signification, in which they are commonly, but not always used; and much confusion has arisen from the ambiguous meanings of these terms. This matter cannot be more clearly explained than in the following passage from one of the most eminent of the French jurists. "The force of written proofs consists in this, that men have agreed together to preserve by writing the recollection of things past, and of which they were desirous to establish the remembrance, either as rules for their guidance, or to have therein a lasting proof of the truth of what they write. Thus, agreements are written to preserve the remembrance of what the contracting parties have prescribed for themselves, and erect that which has been agreed on into a fixed and immutable law for them. So, wills are written to establish the recollection of what a person who had the right to dispose of his property has ordained, and make thereof a rule for his heir and legatees. In like manner are written sentences, decrees, edicts, ordinances, and everything intended to have the effect of title or of law, &c. * * * The writing preserves unchangeably what is entrusted to it, and expresses the intention of the parties by their own testimony" (*i*). Now it is to

(*g*) Per Hill, J., *Reg.* v. *Leatham*, 3 E. & E. 658, 668; and see *infrà*, bk. 3, pt. 2, ch. 3.

(*h*) Bk. 1, pt. 1, § 82, and note (*r*).

(*i*) Domat, Lois Civiles, Part 1, liv. 3, tit. 6, sect. 2. See the original, *supra*, Introd. pt. 2, § 60.

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such documents as are here spoken of, that the terms "writing" and "written evidence" are commonly applied in our books (*k*). The civilians and canonists appear to have included all such under the general name of "Instruments" (*l*); but among us this term is not usually applied to *public* writings. It is not however essential to an instrument that it be the act of two or more parties: it may be unilateral as well as synallagmatic. Thus, a deed poll, or a will, is an "instrument," as much as the most complicated indenture consisting of any conceivable number of parts (*m*).

Secondary signification of "Instrument."

§ 218. "Writings" understood in this sense are of

Divisions of writings.

So deeds usually run, "Now this indenture witnesseth, &c.;" and conclude, "In witness whereof, &c.:" and agreements commonly say, "It is hereby agreed, &c."

(*k*) The word "writing," as well as the Norman French "escript," have been used in this sense from the earliest times; see Litt. sect. 365; Co. Litt. 352 a; 5 Co. 26 a. So in 2 Edw. IV. 3, A. & B. Nota q̃ *Littleton* voile aver pleđ escript per voy de fait, et voile aver appel' ceo un fait, come adire, fist un fait de feoffment. Et *Choke* dit, q̃ c̃ ne poet estre, car il n'est dit un fait, sinon q̃ un livere de ceest ust estre fait, p q̃ *Litt.* luy agree a ceo, et dit que il serr̃ appel un writing, et le appel' un escript conteigne q tiel home enfeoffe tiel home."

(*l*) "Facilioris probationis causâ etiam conficiuntur *instrumenta*. Quo vocabulo quamvis omnia, quibus causa instruitur, adeoque et testes denotentur: hic tamen *instrumentum* est scriptura, ad rerum gestarum memoriam fidemque confecta. Quia autem vel publica fide nititur illa scriptura, vel privata: hinc et instrumentum est vel *publicum*, vel *privatum*. Itaque *publica* habentur instrumenta, confecta à magistratibus, veluti acta publica, tabulæ censuales, apochæ publicæ, in monimenta publica translata, diplomata, et notitiæ, ex archivo publico depromptæ, &c." Heinec. ad Pand. pars 4, §§ 126 & 127. See also Devotus, Inst. Canon. lib. 3, tit. 9, § 20.

(*m*) "Nec minus ex his definitionibus intelligitur, instrumentis *privatis* accensenda esse—1. *Chirographa*, quæ super negotio μονοπλεύρῳ conficiuntur. 2. *Syngraphas*, super negotio διπλεύρῳ scriptas. 3. *Apochas*, quibus sibi solutum fatentur creditores. 4. *Antapochas*, (Reversales), quibus debitor se solvisse, et ad hanc præstationem obstrictum esse fatetur. 5. *Epistolas*. 6. *Libros rationum*, et 7. Quascumque alias scripturas privatorum: Heinec. ad Pand. pars 4, § 128.

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1. Public and Private.

two kinds, "Public" and "Private" (*n*). Under the former come acts of parliament, judgments and acts of courts, both of voluntary and contentious jurisdiction,

2. Judicial and Not judicial.

3. Of record and Not of record..

proclamations, public books, and the like. They are divided into "Judicial" and "Not judicial;" and also into "Writings of record" and "Writings not of record" (*o*). Records, says Lord Chief Baron Gilbert, "are the memorials of the legislature, and of the king's courts of justice, and are authentic beyond all manner of contradiction" (*p*): they are said to be "monumenta veritatis et vetustatis vestigia" (*q*), as also "the treasure of the king" (*r*). But the judgments of tribunals are not in general receivable in evidence against those who were neither party nor privy to them; although, in some instances, the law from motives of policy renders them conclusive and binding on all the world, as in the case of judgments in rem (*s*). Among public documents of a judicial nature, but not of record, may be mentioned various forms of inquisitions, depositions, examinations, writs, pleadings, &c.: and among those of a public nature not judicial, the journals of the Houses of Parliament, the books of the Bank of England, Registers of births, marriages, and deaths, corporation books, books of heralds' visitations, books of deans and chapters, &c.

Public writings.

§ 219. The principle of the admissibility of public writings in general is thus clearly explained in a text work: "Documents of a public nature, and of public authority, are generally admissible in evidence, although their authenticity be not confirmed by the usual and ordinary tests of truth, the obligation of an oath, and

(*n*) *Supra*, note (*l*); 2 Ph. Ev. 1, 10th Ed.

(*o*) 2 Ph. Ev. 1, 10th Ed.

(*p*) Gilb. Ev. 7, 4th Ed. See also Plowd. 491; Co. Litt. 260 a; 4 Co. 71 a; Finch, Law, 231; 1 East, 355; 2 B. & Ad. 367.

(*q*) Co. Litt. 118 a; 293 b. See 2 Rol. 296.

(*r*) 11 Edw. IV. 1.

(*s*) *Infra*, bk. 3, pt. 2, ch. 9.

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the power of cross-examining the parties on whose authority the truth of the document depends. The extraordinary degree of confidence thus reposed in such documents, is founded principally upon the circumstance, that they have been made by authorized and accredited agents appointed for the purpose, and also partly on the publicity of the subject matter to which they relate, and in some instances upon their antiquity. Where particular facts are inquired into, and recorded for the benefit of the public, those who are empowered to act in making such investigations and memorials, are in fact the agents of all the individuals who compose the public; and every member of the community may be supposed to be privy to the investigation. On the ground, therefore, of the credit due to the agents so empowered, and of the public nature of the facts themselves, such documents are entitled to an extraordinary degree of confidence, and it is not requisite that they should be confirmed and sanctioned by the ordinary tests of truth; in addition to this, it would not only be difficult, but often utterly impossible, to prove facts of a public nature by means of actual witnesses examined upon oath" (*t*). This must not be understood to mean that the contents of public writings are admissible in evidence for every purpose:—each public document is only receivable in proof of those matters the remembrance of which it was called into existence to perpetuate. Some public writings are like records—conclusive on all the world: but this is not their general character; as, most usually, they only hold good until disproved.

Private writings.

§ 220. Among private writings, the first and most

(*t*) Stark. Evid. 272—3, 4th Ed. See acc. *Merrick* v. *Wakley*, 8 A. & E. 170; *Doe* d. *France* v. *Andrews*, 15 Q. B. 759, per Erle, J.; Heinec. ad Pand. pars 4, §§ 127 & 129; and Devotus, Inst. Canon. lib. 3, tit. 9, § 20.

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Deeds.

important are those which come under the description of "deeds," i. e. "writings sealed and delivered" (*u*). And they differ from inferior written instruments in this important particular, viz., that they are presumed to have been made on good consideration; and this presumption cannot be rebutted (*x*), unless the instrument is impeached for fraud (*y*); whereas in contracts not under seal a consideration must be alleged and proved (*z*). In former ages deeds were rarely signed, and the essence of that kind of instrument consisted, and indeed consists still, in the sealing and delivery.

> "Re, verbis, scripto, consensu, traditione,
> Junctura, vestes sumere pacta solent"

has been the rule from the earliest times (*a*). "No deed, charter, or writing, can have the force of a deed without a seal" (*b*), and "traditio loqui facit chartam" (*c*). Deeds are usually attested by witnesses; who subscribe their names to signify that the deed has been executed in their presence (*d*). Anciently the number of witnesses was greater than at the present day; and when the execution of a deed was put in issue, process was issued against the witnesses whose names appeared on the instrument, who, on their appearance in court, seem to have discharged in some respects the functions of a jury (*e*); if they were all dead it was tried by a jury—"Super fidem chartarum mortuis testibus erit ad patriam de necessitate recurrendum" (*f*). In modern practice the rule was, that the execution of a deed must be proved by the testimony of at least one of the attest-

(*u*) 2 Blackst. Comm. 295; Co. Litt. 171 b; Finch, L. 108.

(*x*) Plowd. 309; 3 Stark. Ev. 930, 3rd Ed.; *Id.* 747, 4th Ed.

(*y*) *Id.*

(*z*) *Rann* v. *Hughes*, 7 T. R. 350 (n.)

(*a*) Bracton, lib. 2, c. 5, fol. 16 b; Plowd. 161 b; Co. Litt. 36 a.

(*b*) 3 Inst. 169.

(*c*) 5 Co. 1 a; Lofft, Max. 159, 188.

(*d*) 2 Blackst. Comm. 307.

(*e*) 2 Blackst. Comm. 307, 308; Co. Litt. 6 b.

(*f*) Co. Litt. 6 b.

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ing witnesses (*g*). If they were all dead, or insane, or out of the jurisdiction of the court, or could not be found on diligent inquiry, proof might be given of their handwriting (*h*); but the testimony of third parties, even though they might have been present at the execution of the instrument, was not receivable to *prove* it. They might, however, be received to contradict the testimony of the subscribing witnesses (*i*), although formerly this was doubted (*k*). And so far was this principle carried, that even proof of an admission by a party of the execution of a deed, would not in general dispense with proof by the attesting witness (*l*). But it was not necessary to call the attesting witness, or indeed to give any other proof of a deed thirty years old or upwards, and coming from an unsuspected repository (*m*); unless perhaps when there was an erasure or other blemish in some material part of it (*n*).

Instruments not under seal.

§ 221. Instruments *not under seal* are sometimes attested by witnesses; and in such cases it was held that the attesting witness must be called, or his handwriting proved, as in the case of a deed (*o*). But by the Common Law Procedure Act, 17 & 18 Vict. c. 125, s. 26, which, by sect. 103, applies only to civil proceedings, "It shall not be necessary to prove, by the attesting witness, any instrument to the validity of which attestation is not requisite, and such instrument may be proved by admission or otherwise, as if there had been no attesting witness thereto;" and this is extended to

(*g*) *Infrà*, bk. 3, pt. 2, ch. 7.

(*h*) See the cases collected, Stark. Ev. 512—521, 4th Ed. and 2 Phill. Ev. 254 *et seq.*, 10th Ed.

(*i*) *Blurton* v. *Toon*, Holt, 290; *Hudson's case*, Skin. 79; *Lowe* v. *Joliffe*, 1 W. Bl. 365; *Pike* v. *Badmering*, cited 2 Str. 1096; *Jackson* v. *Thomason*, 1 B. & S. 745.

(*k*) Per Alderson, B., in *Whyman* v. *Garth*, 8 Exch. 803.

(*l*) *Infrà*, bk. 3, pt. 2, ch. 7.

(*m*) 2 Phill. Ev. 245-6, 10th Ed.

(*n*) *Id.* 247.

(*o*) *Earl of Falmouth* v. *Roberts*, 9 M. & W. 469; *Streeter* v. *Bartlett*, 5 C. B. 562; *Doe* d. *Sykes* v. *Durnford*, 2 M. & Sel. 62; *Higgs* v. *Dixon*, 2 Stark. 180.

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criminal proceedings by 28 Vict. c. 18, ss. 1, 7. And by the Merchant Shipping Act, 17 & 18 Vict. c. 104, s. 526, "Any document required by this act to be executed in the presence of, or to be attested by, any witness or witnesses, may be proved by the evidence of any person who is able to bear witness to the requisite facts, without calling the attesting witness or witnesses, or any of them." Where there is no attesting witness the usual proof is by the handwriting of the party. The proof of handwriting is so important and peculiar that it will be considered separately (*p*).

Wills.

§ 222. Next as to wills. By the Statute of Frauds, 29 Car. 2, c. 3, s. 5, it was enacted, that all devises and bequests of lands or tenements to be valid, should be in writing and signed by the party, or by some other person in his presence and by his express directions, and attested and subscribed in his presence by at least three credible witnesses. Wills of personalty remained as at the common law and did not require any witness. But by the Wills Act, 7 Will. 4 & 1 Vict. c. 26, this part of the Statute of Frauds is repealed; and it is enacted by sect. 9, that "No will shall be valid unless it shall be in writing and executed in manner hereinafter mentioned; (that is to say,) it shall be signed at the foot or end thereof by the testator, or by some other person in his presence and by his direction; and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time, and such witnesses shall attest and shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary." In carrying out the provisions of this enactment, many wills, just and regular in all other respects, were rendered inoperative for inadvertent non-compliance with the forms which it pre-

(*p*) See *infrà*, ch. 2.

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scribes. To remedy this was passed the 15 & 16 Vict. c. 24, s. 1, which, after reciting sect. 9 of the previous act, enacts, that "Every will shall, so far only as regards the position of the signature of the testator, or of the person signing for him as aforesaid, be deemed to be valid within the said enactment, as explained by this act, if the signature shall be so placed at or after, or following, or under, or beside, or opposite to the end of the will, that it shall be apparent on the face of the will that the testator intended to give effect by such his signature to the writing signed as his will; and that no such will shall be affected by the circumstance that the signature shall not follow or be immediately after the foot or end of the will, or by the circumstance that a blank space shall intervene between the concluding word of the will and the signature, or by the circumstance that the signature shall be placed among the words of the testimonium clause or of the clause of attestation, or shall follow or be after or under the clause of attestation, either with or without a blank space intervening, or shall follow or be after, or under, or beside the names or one of the names of the subscribing witnesses, or by the circumstance that the signature shall be on a side or page or other portion of the paper or papers containing the will whereon no clause or paragraph or disposing part of the will shall be written above the signature, or by the circumstance that there shall appear to be sufficient space on or at the bottom of the preceding side or page, or other portion of the same paper on which the will is written to contain the signature; and the enumeration of the above circumstances shall not restrict the generality of the above enactment; but no signature under the said act or this act, shall be operative to give effect to any disposition or direction which is underneath or which follows it, nor shall it give effect to any disposition or direction inserted after the signature shall be made."

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document are in question, either as a fact directly in issue or a subalternate principal fact, the document is the proper evidence of its *own contents* (*a*). But where a written instrument or document of any description is not a fact in issue, and is merely used as evidence to prove some *act*, independent proof aliundè is receivable. Thus, although a receipt has been given for the payment of money, proof of the fact of payment may be made by any person who witnessed it (*b*). Or, suppose a man had declared by deed, or even put on record—if such a thing can be supposed—his intention to rob or murder another, this would not exclude verbal or other evidence that he had made similar declarations of intention by word of mouth. So, although where the *contents* of a marriage register are in issue, verbal or other evidence of those contents is not receivable, the *fact* of the marriage may be proved by the independent evidence of a person who was present at it. This distinction is well illustrated by the case of *Horn* v. *Noel* (*c*), in which it was proposed to support the defence of coverture of the defendant by two witnesses, who deposed that they were present in a Jewish synagogue when the defendant was married to H. N. The plaintiff's counsel contended that this evidence was insufficient; that it was necessary for the defendant to shew that a marriage had been celebrated according to the rites of the Jews; that with them, what took place in the synagogue was merely a ratification of a previously written contract; and as that contract was essential to the validity of the marriage, it ought to be produced and proved (*d*). The contract, in the Hebrew tongue, was accordingly put in, and translated by means of an interpreter, and the plaintiff was nonsuited. It must also be added that the rule excluding parol evidence as inferior to written does

(*a*) *Infrà*, bk. 3, pt. 2, ch. 3.
(*b*) *Rambert* v. *Cohen*, 4 Esp. 213.
(*c*) 1 Camp. 61.
(*d*) See on this subject Rogers's Eccl. Law, 659, 2nd Ed.

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not exclude *circumstantial* (*e*), nor, according to the better opinion, *self-disserving* evidence (*f*).

Written narratives or memoranda to refresh the memories of witnesses.

§ 224. But although documentary evidence may not be receivable, for want of being verified on oath or its equivalent, or traceable to the party against whom it is offered, the benefit of its *permanence* is not always lost to justice. Thus a witness who has drawn up a written narrative, or made a written memorandum of a matter or transaction, may in many cases use it while under examination as a script to refresh his memory (*g*).

Principle "Quomodo quid constituitur eodem modo dissolvitur."

§ 225. As connected with this subject may be noticed the maxim of law, "Nihil tam conveniens est naturali æquitati unumquodque dissolvi eo ligamine quo ligatum est" (*h*). "Quomodo quid constituitur," says one of our old books, "eodem modo dissolvitur; record per record, escript per escript (*i*), parliament per parliament, parol per parol" (*j*). For instance, things that lie in grant, as they must be created by deed, cannot be surrendered without deed (*k*). This principle was also recognized by the Roman law—"Nihil tam naturale est, quam eo genere quicquid dissolvere, quo colligatum est: ideo verborum obligatio verbis tollitur: nudi consensus obligatio contrario consensu dissolvitur" (*l*).

(*e*) Bk. 3, pt. 2, ch. 1.

(*f*) Bk. 3, pt. 2, ch. 7.

(*g*) *Sandwell* v. *Sandwell*, Comb. 445, Holt, 295; *Doe* d. *Church* v. *Perkins*, 3 T. R. 749; *Burton* v. *Plummer*, 2 A. & E. 341; *Beech* v. *Jones*, 5 C. B. 696; *Smith* v. *Morgan*, 2 Moo. & R. 257; 2 Phill. Ev. 480 *et seq.*, 10th Ed.; *Dyer* v. *Best*, 4 H. & C. 189.

(*h*) 2 Inst. 360, 578; 4 Inst. 28; 2 Co. 53 a; 4 *Id.* 57 b; 5 *Id.* 26 a; 6 *Id.* 43 b; Jenk. Cent. 2, Cas. 25; 3 Scott, N. R. 215; 17 Q. B. 146.

(*i*) By *escript* here must be understood a writing under seal. The word is often used in our old books in this sense. See *suprà*, § 217, note (*k*).

(*j*) Jenk. Cent. 2, Cas. 40. See *Wood* v. *Leadbitter*, 13 M. & W. 838.

(*k*) Wing. Max. 69; Co. Litt. 338 a.

(*l*) Dig. lib. 50, tit. 17, l. 35.

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But the performance of a condition in an instrument under seal may be proved by inferior evidence (*m*), for this does not invalidate the instrument, but sets it up. Thus, payment of a bond may be proved by parol (*n*), &c.

Extrinsic evidence.

Not in general receivable to contradict, vary, or explain written instruments.

§ 226. It has been already stated (*o*), and is indeed an obvious branch of the principle in question, that "parol," or to speak more correctly, "extrinsic" evidence, is not *in general* receivable to contradict, vary, or explain written instruments. "It would be inconvenient," says one of our old books, "that matters in writing, made by advice and on consideration, and which finally import the certain truth of the agreement of the parties, should be controlled by averment of the parties, to be proved by the uncertain testimony of slippery memory" (*p*). But there are many cases where the rejection of such proof would be the height of injustice, and even be absurd. 1. With respect to the varying or explaining instruments there are two rules, "Ambiguitas verborum *patens* nullâ verificatione excluditur" (*q*); "Ambiguitas verborum *latens* verificatione suppletur; nam quod ex facto oritur ambiguum verificatione facti tollitur." The following commentary by Lord Bacon on the latter of these maxims is the recognized basis of the law governing this subject (*r*). "There be two sorts of ambiguities of words, the one is *ambiguitas patens*, and the other *latens*. *Patens* is that which appears to be ambiguous upon the deed or instrument; *latens* is that which seemeth certain and without ambiguity, for anything that appeareth upon the deed or instrument; but there is some collateral matter out of the deed that breedeth the ambiguity. *Ambiguitas*

Exceptions.

1. Difference between *latent* and *patent* ambiguities.

(*m*) See the authorities cited in *West* v. *Blakeway*, 3 Scott, N. R. 199.

(*n*) Doct. & Stud. Dial. 1, ch. 12.

(*o*) *Suprà*, § 223.

(*p*) 5 Co. 26 a.

(*q*) Lofft. Max. 249.

(*r*) Bac. Max. of the Law, Reg. 23.

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patens is never holpen by averment, and the reason is, because the law will not couple and mingle matter of specialty, which is of the higher account, with matter of averment, which is of inferior account in law; for that were to make all deeds hollow, and subject to averments, and so in effect, that to pass without deed, which the law appointeth shall not pass but by deed. Therefore if a man give land to I. D., et I. S. et hæredibus, and do not limit to whether of their heirs, it shall not be supplied by averment to whether of them the intention was the inheritance should be limited. So if a man give land in tail, though it be by will, the remainder in tail, and add a proviso in this manner: Provided that if he, or they, or any of them do any, &c. according to the usual clauses of perpetuities, it cannot be averred upon the ambiguities of the reference of this clause, that the intent of the devisor was, that the restraint should go only to him in the remainder, and the heirs of his body; and that the tenant in tail in possession was meant to be at large. Of these infinite cases might be put, for it holdeth generally that all ambiguity of words by matter within the deed, and not out of the deed, shall be holpen by construction, or in some case by election, but never by averment, but rather shall make the deed void for uncertainty. But if it be *ambiguitas latens*, then otherwise it is: as if I grant my manor of S. to I. F. and his heirs, here appeareth no ambiguity at all; but if the truth be, that I have the manors both of South S. and North S. this ambiguity is matter in fact, and therefore it shall be holpen by averment, whether of them was that the party intended should pass. So if I set forth my land by quantity, then it shall be supplied by election, and not averment. As if I grant ten acres of wood in Sale where I have 100 acres, whether I say it in my deed or no, that I grant out of my 100 acres, yet here shall be an election in the grantee, which ten he will take. And the reason is plain, for

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the presumption of the law is, where the thing is only nominated by quantity, that the parties had indifferent intentions which should be taken, and there being no cause to help the uncertainty by intention, it shall be holpen by election. But in the former case the difference holdeth, where it is expressed and where not; for if I recite, Whereas I am seised of the manor of North S. and South S., I lease unto you *unum manerium de S.* there it is clearly an election. So if I recite, Where I have two tenements in St. Dunstan's, I lease unto you *unum tenementum*, there it is an election, not averment of intention, except the intent were of an election, which may be specially averred. Another sort of *ambiguitas latens* is correlative unto these: for this ambiguity spoken of before, is when one name and appellation doth denominate divers things, and the second, when the same thing is called by divers names. As if I give lands to Christ Church, in Oxford, and the name of the corporation is *Ecclesia Christi in Universitate Oxford*, this shall be holpen by averment, because there appears no ambiguity in the words: for this variance is matter in fact, but the averment shall not be of intention, because it doth stand with the words. For in the case of equivocation the general intent includes both the special, and therefore stands with the words: but so it is not in variance, and therefore the averment must be of matter, that do endure quantity, and not intention. As to say of the precinct of Oxford, and of the University of Oxford, is one and the same, and not to say that the intention of the parties was, that the grant should be to Christ Church in that University of Oxford." A host of cases on this subject, with numerous qualifications and distinctions, are to be found in the books (*s*). We will merely add the following im-

(*s*) See the cases collected in 2 Phill. Ev. chap. 8, 10th Ed.; and Wigram's "Extrinsic Evidence in the Interpretation of Wills," 4th Ed.

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portant observations from the work of Vice-Chancellor Wigram, "Extrinsic Evidence in the Interpretation of Wills," § 200 *et seq.* 4th Ed. "A written instrument is not ambiguous because an ignorant and uninformed person is unable to interpret it. It is ambiguous only, if found to be of uncertain meaning when persons of competent skill and information are unable to do so. Words cannot be ambiguous, because they are unintelligible to a man who cannot read; nor can they be ambiguous, merely because the court which is called upon to explain them may be ignorant of a particular fact, art, or science, which was familiar to the person who used the words, and a knowledge of which is therefore necessary to a right understanding of the words he has used. If this be not a just conclusion, it must follow—that the question, whether a will is ambiguous, might be dependant, not upon the propriety of the language the testator has used, but upon the degree of knowledge, general or even local, which a particular judge might happen to possess; nay, the technical precision and accuracy of a scientific man might occasion his intestacy,—a proposition too absurd for an argument. * * * Again, a distinction must be taken between *inaccuracy* and *ambiguity* of language. Language may be *inaccurate* without being *ambiguous*, and it may be ambiguous although perfectly accurate. If, for instance, a testator having one *leasehold* house in a given place, and no other house, were to devise his *freehold* house there to A. B., the description, though inaccurate, would occasion no ambiguity. If, however, a testator were to devise an estate to John Baker, of Dale, the son of Thomas, and there were two persons to whom the entire description accurately applied, this description, though accurate, would be ambiguous. It is obvious, therefore, that the whole of that class of cases in which an inaccurate description is found to be sufficient merely by the rejection of words of surplusage,

Difference between ambiguity and unintelligibility.

Difference between *inaccuracy* and *ambiguity* of language.

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are cases in which no ambiguity really exists. The meaning is certain, notwithstanding the inaccuracy of the testator's language."

2. Admissible to impeach written instruments for duress, menace, fraud, covin, or collusion.

§ 227. 2. There are some other exceptions to the rule rejecting extrinsic evidence to affect written instruments. Foremost among them come those cases where it is sought to impeach written instruments as having been obtained by duress (*t*), menace (*u*), fraud, covin, or collusion (*v*); which, as is well known, vitiate all acts, however solemn, or even judicial (*x*). "Non videtur consensum retinuisse si quis ex præscripto minantis aliquid immutavit" (*y*)—"Dolus et fraus nemini patrocinantur" (*z*)—"Jus et fraus nunquam cohabitant" (*a*)—"Qui fraudem fit frustrà agit" (*b*)—"Dolus circuitu non purgatur" (*c*). The rejection of parol or other extrinsic proof in such cases, would be applying the rule in question to a purpose for which it was never meant, and rendering it a protection to practices which the law intends to suppress. But the party to an instrument is estopped from setting up his own fraud, &c. to avoid the instrument (*d*); as also are those claiming under him; and the like rule holds in the case of menace or duress (*e*). These principles

(*t*) Dig. lib. 50, tit. 17, l. 116; Perkins, § 16; Bac. Max. Reg. 6; 6 Ho. Lo. Cas. 44, 45; 11 Q. B. 112; 2 Exch. 395; 6 Exch. 67.

(*u*) Dig. in loc. cit.; Bac. Max. R. 22; Shep. Touch. 61; 11 A. & E. 990; 6 Q. B. 280.

(*v*) Dig. lib. 44, tit. 4; Gibert. Corp. Jur. Can. Prolegom. Pars Post. pp. 27 & 28.

(*x*) That judicial acts may be impeached for fraud, see bk. 3, pt. 2, ch. 9.

(*y*) Bac. Max. Reg. 22.

(*z*) M. 30 Edw. III. 32; 14 Hen. VIII. 8 A.; 39 Hen. VI. 50, pl. 15; 1 Keb. 546.

(*a*) 10 Co. 45 a.

(*b*) 2 Roll. 47.

(*c*) Bacon, Max. Reg. 1.

(*d*) 2 Phill. Ev. 360, 10th Ed. See bk. 3, pt. 2, ch. 7.

(*e*) Bracton, lib. 2, c. 5, fol. 15 b; Dyer, 143 b, pl. 56; Plowd. 19; Shep. Touch. 60, 61; *Atlee* v. *Backhouse*, 3 M. & W. 650, per Parke, B.

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are found in the laws of other countries as well as our own (*f*),—

"——— Nec lex est justior ulla,
Quàm necis artifices arte perire suâ" (*g*).

§ 228. 3. Another exception is to be found in the admissibility of the evidence of *usage*; "Optimus interpres rerum usus" (*h*). "Magister rerum usus" (*i*). "Consuetudo loci est observanda" (*j*). Many of the cases on this subject will be found collected in Broom's Maxims, pp. 882—896, 4th Ed.; and the general principles by which it is governed are thus clearly laid down in a work of authority. "Evidence of usage has been admitted, in aid of the construction of written instruments. This evidence has been received for explaining or filling up terms used in commercial contracts, policies of insurance, negotiable instruments, and other writings of a similar kind,—when the language, though well understood by the parties, and by all who have to act upon it in matters of business, would often appear to the common reader scarcely intelligible, and sometimes almost a foreign language. The terms used in these instruments are to be interpreted according to the recognized practice and usage, with reference to which the parties are supposed to have acted; and the sense of the words, so interpreted, may be taken to be the appropriate and true sense intended by the parties" (*k*). "Evidence of usage has been admitted in contracts relating to transactions of commerce, trade, farming or other business, —for the purpose of defining what would otherwise be

3. Evidence of usage to explain written instruments.

(*f*) Dig. lib. 4, tit. 2; Cod. lib. 8, tit. 54, l. 27; Lancel. Inst. Jur. Canon. lib. 2, tit. 25, § 13; Domat, Lois Civiles, Part. 1, liv. 3, tit. 6, sect. 2, § 5; Code Civil, Liv. 3, tit. 3, chap. 6, sect. 3, § 2, art. 1353; Bonnier, Traité des Preuves, § 643, &c.

(*g*) 1 H. Bl. 585.

(*h*) 2 Inst. 282.

(*i*) Co. Litt. 229 b.

(*j*) 6 Co. 67 a; 7 *Id.* 5 a; 10 *Id.* 140 a.

(*k*) 2 Phill. Ev. 407, 10th Ed. See also 2 Stark. Ev. 361, 3rd Ed.

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indefinite, or to interpret a peculiar term, or to explain what was obscure, or to ascertain what was equivocal, or to annex particulars and incidents which, although not mentioned in the contracts, were connected with them, or with the relations growing out of them; and the evidence in such cases is admitted, with the view of giving effect, as far as can be done, to the presumed intention of the parties. Where the language of the contract itself manifests an intention to exclude the operation of usage, evidence of usage cannot be admitted. And in all cases in which this evidence is admitted, it must be presumed that the usage was known to the contracting parties, and that they contracted in reference to it, and in conformity with it (*l*). With this understanding, the reception of evidence of usage is not only justifiable in principle, but absolutely necessary; and without it, the intention of the parties would be often defeated. Usage may be proved, though not general; it may be local, and to a small extent—or professional—or only in a particular branch of business, or among a particular class of persons. Even the usage, or rather the practice, of an individual firm with which a party has contracted, may be resorted to as a medium of exposition, if it may be reasonably inferred that he contracted in reference to such practice" (*m*). "The rule for admitting evidence of usage must be taken always with this qualification, that the evidence proposed is not repugnant to or inconsistent with the written contract. It ought never to be allowed to vary or contradict the written instrument, either expressly or by implication" (*n*). Again, "If the language of ancient charters is become obscure from its antiquity, or the construction is doubtful, the constant and immemorial usage under the instrument may be resorted

(*l*) See, as to this, *Kirchner* v. *Venus*, 12 Moo. P. C. 361, 399.

(*m*) 2 Phill. Ev. 415—16, 10th Ed.

(*n*) *Id.* 417.

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to for the purpose of explanation, though it can never be admitted to control or contradict the express provisions of the instrument. Such continued usage is a strong practical exposition of the meaning of the parties" (*o*).

Interlineations, erasures, &c. in written documents.

§ 229. It seems a rule of universal jurisprudence, that imperfections or blemishes apparent on the face of a document, such as interlineations, erasures, &c., do not vitiate the document, unless they are in some *material* part of it (*p*). One of our old books lays down generally, that "an interlineation, without anything appearing against it, will be presumed to be at the time of the making of the deed, and not after" (*q*); other authorities seem disposed to extend this doctrine to erasures (*r*); and both positions have recently been confirmed by the Court of Queen's Bench (*s*). But that an erasure or alteration in a *suspicious* place must be explained by the party seeking to enforce the instrument, has been law from the earliest times (*t*). And this principle is fully recognized at the present day (*u*), especially where an alteration affects the stamp required for a document (*x*). The whole subject is however guarded by many restrictions and limitations (*y*). In the case of

(*o*) 2 Phill. Ev. 419, 10th Ed.

(*p*) Mascard. de Prob. Concl. 256, 284; Lancel. Inst. Jur. Can. lib. 3, tit. 14, § 43; Devot. Inst. Canon. lib. 3, tit. 9, § 21, 5th Ed.; Fleta, lib. 6, c. 34, s. 5; Co. Litt. 225 b; 10 Co. 92 b; Cro. Car. 399; Dicks. Law Ev. in Scotl. 179; *Aldous* v. *Cornwell*, L. Rep., 3 Q B. 573.

(*q*) *Trowel* v. *Castle*, 1 Keb. 21 (5), recognized Butl. Co. Litt. 225 b, note (1).

(*r*) Shep. Touch. 53, note (*l*), 8th Ed.

(*s*) *Doe* d. *Tatum* v. *Catemore*, 16 Q. B. 745. See also, per Lord Cranworth, V. C., in *Simmons* v. *Rudall*, 1 Sim., N. S. 115, 136.

(*t*) 7 Edw. III. 57, pl. 44; and 27, pl. 13.

(*u*) *Earl of Falmouth* v. *Roberts*, 9 M. & W. 469.

(*x*) *Knight* v. *Clements*, 8 A. & E. 215.

(*y*) See Tayl. Ev. §§ 1616—1638, 4th Ed.; 1 Smith, Lead. Cas. 776 *et seq.* 5th Ed.; *Pigot's case*, 11 Co. 26 b; *Davidson* v. *Cooper*, 11 M. & W. 778; 13 *Id.* 343. The rule laid down in *Pigot's case*, viz. that the alteration of a

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wills, the rule seems reversed—unattested alterations and interlineations being, in the absence of evidence, presumed to have been made after the execution of the will (*z*). And by the 21st section of the Wills Act, 7 Will. 4 & 1 Vict. c. 26, it is enacted, that "No obliteration, interlineation, or other alteration made in any will after the execution thereof shall be valid or have any effect, except so far as the words or effect of the will before such alteration shall not be apparent, unless such alteration shall be executed in like manner as hereinbefore is required for the execution of the will; but the will, with such alteration as part thereof, shall be deemed to be duly executed, if the signature of the testator and the subscription of the witnesses be made in the margin or on some other part of the will opposite or near to such alteration, or at the foot or end of or opposite to a memorandum referring to such alteration, and written at the end or some other part of the will."

Stamps.

§ 230. Various acts of parliament, for the system is unknown to the common law, have imposed as a condition precedent to the admissibility in evidence of most documents, the pre-payment to the State of a sum of money, the receipt of which is indicated by a "stamp," affixed by a public officer. An exposition of the Stamp Laws would be wholly unsuited to this work: but there are two things connected with the subject which ought to be borne in mind. First, A document which

deed by the obligee himself, *although it be in words not material*, makes the deed void, has recently been held not to be law. *Aldous* v. *Cornwell*, L. Rep., 3 Q. B. 573, 579.

(*z*) *Cooper* v. *Bockett*, 4 Moo. P. C. C. 419; *Doe* d. *Shallcross* v. *Palmer*, 16 Q. B. 747; *Greville* v. *Tylee*, 7 Moo. P. C. C. 320; *Simmons* v. *Rudall*, 1 Sim., N. S. 136. See also *Gann* v. *Gregory*, 3 De G., Mac. & G. 777. But in a recent case it was said, that the court was not precluded by the absence of *direct* evidence, from considering the nature of the interlineations, and the *internal* evidence furnished by the document itself. Per Sir J. P. Wilde, *In the goods of Cadge*, L. Rep., 1 P. & D. 543, 545.

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is lost (*a*), or not produced on notice (*b*), will be presumed to have been duly stamped, until the contrary is shewn. Secondly, Although unstamped documents are not admissible in evidence for the purpose of proving any fact *directly*, yet it is otherwise when they are tendered for *collateral* purposes (*c*); as, for instance, to shew illegality or fraud in a transaction of which the document forms a part (*d*). The principal case establishing this doctrine is that of *Coppock* v. *Bower* (*e*), in which several others will be found cited. Lord Abinger, C. B., there says, "The object of both the statute and common law would be defeated, if a contract, void in itself, could not be impeached, because the written evidence of it is unstamped, and therefore inadmissible. If that were so, a party entering into such agreement might avoid the consequences of its illegality, by taking care that no stamp should be affixed to it. I think, therefore, that in all cases where the question is whether the agreement is void at common law or by statute, and the party introduces it, not to set it up and establish it, but to destroy it altogether, there is no objection to its admissibility. As in the case of a conspiracy, or an agreement to commit a robbery, on no principle could it be contended that a contract between the parties for the commission of such an offence would be inadmissible without a stamp. I think that the Stamp Acts are made for a different purpose—they are made to prevent

Lost documents presumed to have been duly stamped.

Unstamped documents admissible for collateral purposes, e. g. to shew illegality or fraud.

(*a*) *Pooley* v. *Godwin*, 4 A. & E. 94; *Hart* v. *Hart*, 1 Hare, 1; *R.* v. *The Inhabitants of Long Buckby*, 7 East, 45.

(*b*) *Crisp* v. *Anderson*, 1 Stark. 35; *Closmadeuc* v. *Carrel*, 18 C. B. 36. See also the case of *Bradlaugh* v. *De Rin*, L. Rep., 3 C. P. 286, as to the presumption that an instrument, on which there is a stamp when produced at the trial, was stamped in proper time.

(*c*) *Mattheson* v. *Ross*, 2 Ho. Lo. Cas. 286; *Evans* v. *Prothero*, 2 Mac. & G. 319.

(*d*) *Coppock* v. *Bower*, 4 M. & W. 361; *R.* v. *Gompertz*, 9 Q. B. 824; *Holmes* v. *Sixsmith*, 7 Exch. 802; *Ponsford* v. *Walton*, L. Rep., 3 C. P. 167.

(*e*) *Coppock* v. *Bower*, 4 M. & W. 361.

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persons from availing themselves of the obligatory force of an agreement, unless that agreement is stamped."

Since 17 & 18 Vict. c. 83, s. 27, not required in criminal cases.

§ 231. Several important alterations in the law and practice relative to stamps were made by the statutes passed in the 17 & 18 Vict. By c. 83, sect. 27, "Every instrument liable to stamp duty shall be admitted in evidence in any criminal proceeding, though it may not have the stamp required by law impressed thereon or affixed thereto."

Alterations introduced by 17 & 18 Vict. c. 125, in civil cases.

And the 17 & 18 Vict. c. 125 (the Common Law Procedure Act, 1854) contains the following provisions, which, however, only apply to civil cases, sect. 103.

Sect. 28. "Upon the production of any document as evidence at the trial of any cause, it shall be the duty of the officer of the court whose duty it is to read such document, to call the attention of the judge to any omission or insufficiency of the stamp; and the document, if unstamped, or not sufficiently stamped, shall not be received in evidence until the whole or (as the case may be) the deficiency of the stamp duty, and the penalty required by statute, together with the additional penalty of one pound, shall have been paid."

Sect. 29. "Such officer of the court shall, upon payment to him of the whole or (as the case may be) of the deficiency of the stamp duty payable upon or in respect of such document, and of the penalty required by statute, and of the additional penalty of one pound, give a receipt for the amount of the duty or deficiency which the judge shall determine to be payable, and also of the penalty, and thereupon such document shall be admissible in evidence, saving all just exceptions on other grounds; * * * and the Commissioners" of the Inland Revenue "shall, upon request, and production of the receipt hereinbefore mentioned, cause such documents to be stamped with the proper stamp or stamps in respect of the sums

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so paid as aforesaid : Provided always, that the aforesaid enactment shall not extend to any document, which cannot now be stamped after the execution thereof on payment of the duty and a penalty."

Sect. 31. " No new trial shall be granted by reason of the ruling of any judge that the stamp upon any document is sufficient, or that the document does not require a stamp."

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Chapter II.

PROOF OF HANDWRITING.

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Proof of handwriting.

§ 232. In this chapter it is proposed to consider a species of proof necessarily much resorted to in judicial proceedings; but which presents many difficulties, and has in every age been found a source of embarrassment

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to legislators, jurists, and practitioners—the proof of handwriting (*a*). We speak not of cases where the fact of the scription of a document is proved by eye-witnesses, or by the admissions of parties, or is inferred from circumstances; but where a judgment or opinion that a given document is or is not in the handwriting of a given person, is based on its resemblance to or dissimilarity from that of the supposed writer, an acquaintance with which has been formed by means extraneous to that document. This is a species of circumstantial real evidence (*b*), and, like other species of circumstantial evidence, is not secondary to direct. Thus evidence of the nature in question is perfectly receivable, although the writer of the supposed document is not examined to say whether he wrote it (*c*), and this even if he were actually present in court; although the not calling him would of course be matter of strong observation to the jury. A document wholly in the handwriting of a party is said to be an autograph or holograph (*d*); where it is in the handwriting of another person and only signed by the party, the signature may be called

Proof of handwriting by resemblance to that of supposed writer, &c.

A species of circumstantial real evidence.

Not secondary to direct evidence.

Autograph or holograph.

(*a*) Much of this chapter has been taken from an article, by the author, in the Monthly Law Magazine, vol. 7, p. 120. The rules of the Roman law respecting handwriting are contained in Novel. LXXIII., which, we are told in the beginning of it, was framed in consequence of the practice of counterfeiting handwriting, and the difficulties of a case which had arisen in Armenia. For the practice of the civilians, the reader is referred to Cujacius in 73 Nov.; Huberus, Præl. Jur. Civ. lib. 22, tit. 4, nn. 16 and 20; Voet. ad Pand. lib. 22, tit. 4, n. 11; Mascard. de Prob. Concl. 285, 330, 331; and Oughton, Ordo Judicior. tit. 225. The framers of the Codes Napoléon seem to have been fully sensible of the difficulties attendant on this subject, and, while admitting proof of handwriting by comparison, have taken great pains to ensure the genuineness of the specimens used for the purpose. Code de Procédure Civile, Part 1, liv. 2, tit. 10, art. 193—213. *De la vérification des écritures.*

(*b*) 2 Benth. Jud. Ev. 460.

(*c*) *R.* v. *Hughes*, 2 East, P. C. 1002; *R.* v. *M'Guire*, *Id.*; *The Bank Prosecutions*, R. & R. C. C. 378.

(*d*) 2 Benth. Jud. Ev. 459, 460, 461; 16 C. B. 535-6.

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Onomastic and symbolic signatures.

"onomastic;" where by a cross or other symbol, "symbolic" (*e*).

Different forms of proof of handwriting by resemblance, &c.

§ 233. Abstractedly considered, it is clear that a judgment respecting the genuineness of handwriting, based on its resemblance to or dissimilarity from that of the supposed writer, may be formed by one or more of the following means:—1st, A standard of the general nature of the handwriting of the person may be formed in the mind, by having on former occasions observed the characters traced by him while in the act of writing, with which standard the handwriting in the disputed document may, by a mental operation, be compared. 2ndly, A person who has never seen the supposed writer of the document write, may obtain a like standard by means either of having carried on written correspondence with him, or having had other opportunities of observing writing which there was reasonable ground for presuming to be his. 3rdly, A judgment as to the genuineness of the handwriting to a document may be formed, by a comparison instituted between it and other documents known or admitted to be in the handwriting of the party. These three modes of proof—the admissibility and weight of which we propose to consider in their order—have been accurately designated respectively "Præsumptio ex visu scriptionis;" "Præsumptio ex scriptis olim visis;" and "Præsumptio ex comparatione scriptorum," or "ex scripto nunc viso" (*f*).

1°. Presumption "ex visu scriptionis."

§ 234. The rule with respect to proof "ex visu scriptionis" is clear and settled; namely, that any person who has ever seen the supposed writer of a document write, so as to have thereby acquired a standard in his own mind of the general character of the handwriting of that party, is a competent witness to say whether he

(*e*) 2 Benth. Jud. Ev. 459, 460, 461.

(*f*) 3 Benth. Jud. Ev. 598, 599.

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believes the handwriting of the disputed document to be genuine or not (*g*). The having seen the party write but once (*h*), no matter how long ago (*i*), or having seen him merely write his signature (*k*), or even only his surname (*l*), is sufficient to render the evidence *admissible:* the weakness of it is matter of comment for the jury. Where a person who cannot write is desirous of subscribing his name to a document, another person writes it for him, which signature he identifies by affixing over or near it a mark, usually a cross. Here it is obvious the difficulty of proof is much increased. "In the symbolic mode of signature," observes Bentham (*m*), "whatever security is afforded by the two other modes (viz. against spuriousness pro parte as well as in toto by the holographic, against spuriousness in toto by the onomastic) is manifestly wanting: a cross (the usual mark) made by one man not being distinguishable from a cross made by another, the *real* part of evidence has no place. Recognition, viz. by deportment, is the only way in which this mode of authentication can be said to operate." This is rather too broadly stated. Unless there is something to identify the mark as being that of a particular person, the evidence seems not admissible; but otherwise it is impossible to distinguish this in principle from any other form of proof ex visu scriptionis. In one case (*n*), in order to prove the indorsement of a bill of exchange by one A. M., which was

(*g*) *De la Motte's case*, 21 Ho. St. Tr. 810; *Eagleton* v. *Kingston*, 8 Ves. 473, 474; *Lewis* v. *Sapio*, 1 M. & M. 39; *Willman* v. *Worrall*, 8 C. & P. 380; also *Garrells* v. *Alexander*, 4 Esp. 37.

(*h*) *Willman* v. *Worrall*, 8 C. & P. 380; Phill. & Am. Ev. 692. See also *Warren* v. *Anderson*, 8 Scott, 384.

(*i*) *R.* v. *Horne Tooke*, 25 Ho. St. Tr. 71, 72; *Eagleton* v. *Kingston*, 8 Ves. 474, per Lord Eldon.

(*k*) *Garrells* v. *Alexander*, 4 Esp. 37; *Willman* v. *Worrall*, 8 C. & P. 380.

(*l*) *Lewis* v. *Sapio*, 1 M. & M. 39, overruling *Powell* v. *Ford*, 2 Stark. 164.

(*m*) 2 Benth. Jud. Ev. 461.

(*n*) *George* v. *Surrey*, 1 M. & M. 516. See per Parke, B., in *Sayer* v. *Glossop*, 12 Jur. 465.

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indorsed by mark, a witness was called who stated that he had frequently seen A. M. make her mark and so sign instruments, and he pointed out some peculiarity. Tindal, C. J., after some hesitation, admitted the evidence as sufficient, and the plaintiff had a verdict. In a court of equity also, where it was sought to prove a debt due by a deceased person to one W. P., and to prevent the debt from being barred by the Statute of Limitations, receipts for interest were produced in the handwriting of the deceased, and signed with the christian and surname of W. P., having a cross between them; and an affidavit was produced that P. was a marksman, and that the signs or marks on those documents were respectively the mark or sign of W. P. used by him in place of signing his name; Shadwell, V. C., thought the proof of the signature sufficient (*o*).

2°. Presumption "ex scriptis olim visis."

§ 235. The practice with reference to the presumption "ex scriptis olim visis" is thus clearly stated by Patteson, J., in the case of *Doe* d. *Mudd* v. *Suckermore* (*p*): "That knowledge" (scil. of handwriting) "may have been acquired by the witness having seen letters or other documents professing to be the handwriting of the party, and having afterwards communicated personally with the party upon the contents of those letters or documents, or having otherwise acted upon them by written answers, producing further cor-

(*o*) *Pearcy* v. *Dicker*, 13 Jur. 997. See also *Baker* v. *Dening*, 8 A. & E. 94; *In the goods of Bryce*, 2 Curt. 325.

(*p*) 5 A. & E. 703, 730. See also *Lord Ferrers* v. *Shirley*, Fitzg. 195; *Cary* v. *Pitt*, Peake's Ev. App. xxxiv.; *Tharpe* v. *Gisburne*, 2 C. & P. 21; *R.* v. *Slaney*, 5 C. & P. 213; *Harrington* v. *Fry*, R. & M. 90; *Layer's case*, 16 Ho. St. Tr. 205; *Gould* v. *Jones*, 1 W. Blackst. 384; *Middleton* v. *Sandford*, 4 Camp. 34; *Parkins* v. *Hawkshaw*, 2 Stark. 239; *Greenshields* v. *Crawford*, 9 M. & W. 314; *Batchelor* v. *Honeywood*, 2 Esp. 714; *Murieta* v. *Wolfhagen*, 2 Car. & K. 744.

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respondence, or acquiescence by the party in some matter to which they relate, or by the witness transacting with the party some business to which they relate, or by any other mode of communication between the party and the witness which, in the ordinary course of the transactions of life, induces a reasonable presumption that the letters or documents were the handwriting of the party, evidence of the identity of the party being of course added aliundè, if the witness be not personally acquainted with him." The number of papers, however, which the witness may have seen in the handwriting of the party is perfectly immaterial, so far as relates to the *admissibility* of the evidence (*q*). Nor is it absolutely necessary for this purpose, that any act should be done or business transacted by the witness in consequence of the correspondence (*r*). "The clerk," says Lord Denman, in *Doe* d. *Mudd* v. *Suckermore* (*s*), "who constantly read the letters, the broker who was ever consulted upon them, is as competent to judge whether another signature is that of the writer of the letters, as the merchant to whom they were addressed. The servant who has habitually carried letters addressed by me to others has an opportunity of obtaining a knowledge of my writing, though he never saw me write, or received a letter from me."

Knowledge must not have been acquired with a view to the specific occasion.

§ 236. It seems however that, in order to render admissible either of the above modes of proof of handwriting, the knowledge must not have been acquired or communicated with a view to the specific occasion on which the proof is offered (*t*). In a case where the question turned on the genuineness of the handwriting on a bill of exchange, purporting to have been accepted

(*q*) Phil. & Am. Ev. 693.

(*r*) *Id.*; 2 Stark. Ev. 514, n. (*m*), 3rd Ed.

(*s*) 5 A. & E. 703, 740.

(*t*) See the judgments of Patteson and Coleridge, JJ., in *Doe* d. *Mudd* v. *Suckermore*, 5 A. & Ell. 703.

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by the defendant, the evidence of a witness who stated that he had seen the defendant write his name several times before the trial, he having written it for the purpose of shewing to the witness his true manner of writing it, that the witness might be able to distinguish it from the pretended acceptance to the bill, was rejected by Lord Kenyon, as the defendant might through design have written differently from his common mode of writing his name (*u*). So where, on an indictment for sending a threatening letter, the only witness called to prove that the letter was in the handwriting of the accused, was a policeman, who, after the letter had been received and suspicions aroused, was sent by his inspector to the accused to pay him some money and procure a receipt, in order thus to obtain a knowledge of his handwriting by seeing him write; his evidence was rejected by Maule, J., on the ground, that "Knowledge obtained for such a specific purpose and under such a bias, is not such as to make a man admissible as a *quasi expert* witness" (*x*).

Refreshing memory of witnesses.

§ 237. It has been made a question, whether a witness, who, either ex visu scriptionis or ex scriptis olim visis, has acquired a knowledge of the handwriting of a party, but which, from length of time, has partly faded from his memory, may be allowed, during examination, to refresh his memory by reference to papers or memoranda proved to be in the handwriting of the party. In one case a witness was allowed to do so by Dallas, C. J., at Nisi Prius (*y*); but the correctness of that decision was denied by Patteson, J., in *Doe* d. *Mudd* v. *Suckermore* (*z*); and the propriety of the practice may fairly be questioned.

(*u*) *Stanger* v. *Searle*, 1 Esp. 14.

(*x*) *R.* v. *Crouch*, 4 Cox, Cr. Cas. 163.

(*y*) *Burr* v. *Harper*, Holt, N. P. C. 420.

(*z*) 5 A. & E. 703, 737.

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3°. Presumption "ex comparatione scriptorum."

§ 238. We now proceed to the third part of this subject, namely, whether and under what circumstances it is competent to prove the handwriting of a party to a document, by a comparison or collation instituted between it and other documents proved or assumed to be in his handwriting. By the general rule of the common law such evidence was not receivable (*a*)—for which three reasons are assigned in our books. First, that the writings offered for the purpose of comparison with the document in question might be spurious; and, consequently, that, before any comparison betweem them and it could be instituted, a collateral issue must be tried, to determine their genuineness. Nor is this all—if it were competent to prove the genuineness of the main document by comparison with others, it must be equally so to prove that of the latter by comparison with fresh ones, and so the inquiry might go on *ad infinitum*, to the great distraction of the attention of the jury, and delay in the administration of justice (*b*). 2ndly, that the specimens might not be fairly selected (*c*). 3rdly, that the persons composing the jury might be unable to read, and, consequently, unable to institute such a comparison (*d*). As to the last of these objections, it does not seem satisfactory logic to prohibit a jury which can read from availing themselves of that means for the investigation of truth, because other juries might, from want

General rule of the common law—not receivable as evidence.

Reasons assigned for rejecting it.

Examination of them.

(*a*) *Doe* d. *Mudd* v. *Suckermore*, 5 A. & E. 703; *Stanger* v. *Searle*, 1 Esp. 14; *Groaves* v. *Hunter*, 2 C. & P. 477; *Macferson* v. *Thoytes*, 1 Peake, 20; *Brookbard* v. *Woodley*, *Id.* n. (*a*); *R.* v. *Cator*, 4 Esp. 117; *De la Motte's case*, 21 Ho. St. Tr. 810; *Francia's case*, 15 Ho. St. Tr. 923.

(*b*) Per Coleridge, J., in *Doe* d. *Mudd* v. *Suckermore*, 5 A. & E. 706, 707; 2 Stark. Ev. 516, 3rd Ed.; *R.* v. *Sleigh*, Surrey Sum. Ass. 1851, per Alderson, B., MS.

(*c*) *Id.*; and per Dallas, C. J., in *Burr* v. *Harper*, Holt, N. P. C. 420.

(*d*) Per Lord Kenyon, C. J., in *Macferson* v. *Thoytes*, 1 Peake, 20; per Dallas, C. J., in *Burr* v. *Harper*, Holt, N. P. C. 420; per Yates, J., in *Brookbard* v. *Woodley*, 1 Peake, 20 n. (*a*); per Lord Eldon, C., in *Eagleton* v. *Kingston*, 8 Ves. 475.

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of education, be disqualified from so doing;—if some men are blind, that is no reason why all others should have their eyes put out. Nor is the second objection very formidable—it is not always easy to obtain unfair specimens, and should such be produced, it would be competent to the opposite party to encounter them with true ones. But there certainly was great weight in the first objection, particularly when taken in connexion with the general rules of common law practice. So long as parties to a suit were allowed to mask their evidence till the very moment of trial, so long would it have been highly dangerous to permit either of them to adduce ad libitum, for the purpose of comparison, a number of supposed specimens of handwriting, which the opposite party, having had no previous notice of the intention to adduce, would not be in a condition either to answer or contradict—specimens which might not be fairly selected, or even be the handwriting of the party to whom they are attributed. Still the exclusion of the proof of handwriting by comparison was not satisfactory (*e*)—and if any practical means could be devised to secure at least the *genuineness* of the specimens, it ought on every principle to be received: and the legislature in modern times has accordingly taken the matter in hand, as will be shewn presently (*f*).

Exceptions. 1. Documents which are evidence in the cause, &c.

§ 239. There are several common law exceptions to the rule excluding proof of handwriting by comparison: the first of which is, that it is competent for the court and jury to compare the handwriting of a disputed document, with any others which are in evidence in the cause, and which are admitted or proved to be in the handwriting of the supposed writer (*g*). The ground of

(*e*) 2 Ev. Poth. 185; 2 Stark. Ev. 516, 3rd Ed.; Phill. & Am. Ev. 698.

(*f*) See 17 & 18 Vict. c. 125, ss. 27 and 103, and 28 Vict. c. 18, ss. 8 and 1, *infrà*.

(*g*) *Griffith* v. *Williams*, 1 C. & J. 47; *Doe* d. *Perry* v.

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this exception is sometimes said to be, that, the documents being already before the jury, to prevent their mentally instituting such comparison would be impossible (*h*); but another and better reason is, that this sort of proof is not open to the dangers to which the comparison of hands is exposed—namely, the raising collateral issues, and the jury being misled by spurious specimens.

2. Ancient documents.

§ 240. Another exception is the case of ancient documents. When a document is of such a date, that it cannot reasonably be expected to find living persons acquainted with the handwriting of the supposed writer, either by having seen him write, or by having held correspondence with him, the law, acting on the maxim, "Lex non cogit impossibilia" (*i*), allows other ancient documents, which are proved to have been treated and regularly preserved as authentic, to be compared with the disputed one (*j*). It is not easy to determine the precise degree of antiquity which is sufficient to let in evidence of this nature. In *Roe* d. *Brune* v. *Rawlings* (*k*), the supposed writer had been dead about sixty years; in *Doe* d. *Tilman* v. *Tarver* (*l*), the writing was nearly one hundred years old; and in *Doe* d. *Jenkins* v. *Davies* (*m*) it was eighty-four years old. And how this comparison is to be made is not clearly settled. In Buller's Nisi Prius (*n*) a case is referred to, decided by Lord Hardwicke, in Dec. 1746, where a parson's book

Newton, 5 A. & E. 514; *Solita* v. *Yarrow*, 1 M. & Rob. 133; *R.* v. *Morgan*, *Id.* 134, n.; *Allport* v. *Meek*, 4 C. & P. 267; *Bromage* v. *Rice*, 7 C. & P. 548; *R.* v. *Sleigh*, Surrey Sum. Ass. 1851, per Alderson, B., MS.

(*h*) *Doe* d. *Perry* v. *Newton*, 5 A. & E. 514.

(*i*) Hob. 96.

(*j*) Phill. & Am. Ev. 701; 2 Stark. Ev. 516, 517, 3rd Ed.; B. N. P. 236; *Roe* d. *Brune* v. *Rawlings*, 7 East, 282, n. (*a*); *Doe* d. *Tilman* v. *Tarver*, R. & M. 141; *Doe* d. *Mudd* v. *Suckermore*, 5 A. & E. 703; *Doe* d. *Jenkins* v. *Davies*, 10 Q. B. 314.

(*k*) 7 East, 282, note (*a*).

(*l*) R. & M. 141.

(*m*) 10 Q. B. 314.

(*n*) B. N. P. 236.

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was produced to prove a modus; the parson having been long dead, a witness who had examined the parish books, in which was the same parson's name, was permitted to swear to the similitude of the handwriting, &c. In the case of *Sparrow* v. *Farrant* (*o*), Holroyd, J., is reported to have said that, in order to make ancient signatures available for this purpose, a witness should be produced who is able to swear, from his having examined several of such signatures, that he has acquired a sufficient knowledge of the handwriting to be able, without an actual comparison, to state his belief on the subject. Subsequent to this, however, came the case of *Doe* d. *Tilman* v. *Tarver* (*p*), which was an action of ejectment, tried in 1824, where, in order to prove that a place called Yard Farm was part of a certain manor, a paper was put in evidence which had been handed over to the present steward, amongst other papers and books relating to the manor, by the representatives of the late steward, intitled "An account of E. H." (who appeared by the books and rolls belonging to the manor to have been steward), "receiver of the Isle of Wight estates of the Lady F. for two years ending at Michaelmas, 1727," which contained an entry relative to Yard Farm. In order to prove the handwriting of E. H., "Lord Chief Justice Abbott," says the report, "directed the person producing the paper, to compare it with the handwriting of E. H. in other papers belonging to the manor, and to say upon oath, whether he believed the writings were by the same person:" adding that this course had once been adopted by Lawrence, J. The observation of Lord Denman on this and some other cases, in *Doe* d. *Mudd* v. *Suckermore* (*q*), that it does not distinctly appear from the reports, whether the comparison was made with a standard formed in the mind of the witness by an in-

(*o*) 2 Stark. Ev. 517, n. (*e*), 3rd Ed.; Devon Sp. Ass. 1819.

(*p*) R. & M. 141.

(*q*) 5 A. & E. 703, 748.

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spection of the papers produced, or whether a direct comparison was made in the first instance, seems well founded; and no objection as to the mode of putting the question appears to have been raised by the counsel on either side. It is probable also that the witness examined in the case before Lawrence, J., was a scientific witness, or expert,—the report speaks of him as being accidentally in court at the time.

§ 241. In this state of the authorities the case of the *Fitzwalter peerage* (*r*) came before the committee of privileges of the House of Lords; and we shall state this case somewhat at length, it being one of the most important on the subject of handwriting in general, as well as bearing strongly on the point under consideration. It was a claim to a peerage which had fallen into abeyance in 1756, and the petition was heard in May, 1843. The claimant, in order to prove his case, proposed to put in evidence some family pedigrees, which were produced from the proper custody. They purported to have been made by E. F., who died in 1751. He had stood in the direct line of the claimant's ancestors; so that if those pedigrees could be proved to be of the handwriting of E. F., they would be admissible in evidence for the claimant, as declarations made by a deceased relative, of circumstances respecting the state of his family and immediate relatives. It was proposed to prove the handwriting of E. F., by producing from the Prerogative Office his will, already received in evidence for other purposes, and four other documents, which were proved to be of his handwriting; namely, a confidential letter written by him to the steward of his manor; another letter by him, appointing a gamekeeper within that manor; a memorandum in an account book; and a deed of settlement of property comprised within that manor. These were produced

(*r*) 10 Cl. & F. 193.

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from a closet which contained the claimant's family muniments, including the title deeds of the manor and property, which then belonged to him in right of his grandmother. It was proved that the deed of settlement had been repeatedly, and very recently, acted upon, and that all the documents had the genuine signature of "E. F." It was next proposed to prove the identity of the signer of those documents with the writer of the pedigrees, by comparison of the handwriting of the latter with the signatures to the proved documents; and for this purpose the inspector of franks in the General Post Office, who had had much experience in distinguishing the characters of handwriting, was called. "Being asked," says the report, "if he had examined the signatures of E. F. to three of the documents, the deed, the will, and the appointment of gamekeeper, all of which were produced to him, he said he had examined the signature to the will in the Prerogative Office twice, and looked four or five times at the signatures to the letter and other documents of E. F., and to the handwriting of the entries in the account book, and of queries on the pedigree of the family at the office of the claimant's solicitor; and he considered that, by the inspections he had made, he was so familiar with the handwriting of the person by whom these documents were written or signed, that, without any immediate comparison with them, he should be able to say whether any other document produced was or was not in the handwriting of the same person. He believed all these documents to have been signed by the same person; and he did not form his opinion merely from the signatures, but more from the general similarity of the letters, which he said were written in a remarkable character." This evidence was objected to by the Attorney-General, on the ground that the witness's knowledge of the handwriting was acquired, not in the ordinary course of business, but from having studied the handwriting for the purpose of

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speaking to the identity of the writer. In support of the evidence several cases were cited by the claimant's counsel, and among others *Doe* d. *Tilman* v. *Tarver* and *Sparrow* v. *Farrant;* to which it was replied that the Court of Queen's Bench had become more strict in its practice since those cases, most of which were cases at nisi prius or on the circuits. The pedigree was rejected by the committee as evidence, and Lord Brougham added, that about five years before, the Lord Chief Justice of the Queen's Bench had consulted him on that kind of evidence, and their joint impression was, that if *Doe* d. *Tilman* v. *Tarver* and *Sparrow* v. *Farrant* were correctly reported, they had gone farther than the rule was ever carried. "In the present case," he added, "the Lord Chancellor (Lyndhurst) and himself were clearly of opinion, that they ought not to allow a person to say from inspection of the signatures to two or three documents—two only, the deed and will, being genuine instruments, admitted to be in the handwriting of E. F.,—from the inspection of those two documents, that he could prove the handwriting of the party. No doubt such evidence had been often received, because it was not objected to. A witness was properly allowed to speak to a person's handwriting, from inspection of a number of documents with which he had grown familiar from frequent use of them; and it was on that ground that a person's solicitor and steward were admitted to prove his handwriting." The claimant's counsel having then referred to *Goodtitle* d. *Revett* v. *Braham* (*s*), in which an inspector of franks at the Post Office was admitted to say as a matter of skill and judgment, whether the name signed to a will was genuine or in a feigned hand, Lord Brougham continued, "Yes, truly; for that is matter of professional

(*s*) 4 T. R. 497.

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skill. But that is no reason for admitting a witness to speak to the real handwriting of a person, from only having seen a few of his signatures to other instruments produced to him, and that for the purpose of proving its identity." A person was then called who said he had been the family solicitor of the claimant for more than thirty years, and prior to that had been clerk to his uncle, who was the family solicitor for forty years; and, in answer to questions put to him, said that he had acquired a knowledge of the character of the handwriting of E. F., from his acquaintance with a great number of title deeds, account books, and other instruments, purporting to have been written or signed by him, which he had occasion to examine from time to time in the course of business for his client, who then held the F. estates. This witness was admitted to prove the handwriting of the pedigree; and he said he believed, and felt no doubt whatever, that the whole of it was in the handwriting of E. F., with the exception of a few words near the bottom, which he pointed out.

§ 242. Since the case of the *Fitzwalter peerage*, the case of *Doe* d. *Jenkins* v. *Davies* (*t*) was decided by the Court of Queen's Bench. At the trial of the cause in 1845, the parish clerk of a parish at Bristol produced the register of that parish for 1761, which contained an entry of a marriage exactly corresponding with a certificate produced, dated 1761, both purporting to be signed by "W. D.," curate. The witness stated that he had been clerk for seven years and a half, and during that time had acquired a knowledge of the handwriting of W. D. from various signatures in the register; and that he believed the signatures to the entry in question in the register, and to the certificate, to be in the handwriting of W. D. This evidence was received

(*t*) 10 Q. B. 314.

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by Coltman, J., as proof of the curate's handwriting, and his ruling was affirmed by the court.

Proof of handwriting to *modern* documents by knowledge acquired from specimens.

§ 243. Considerable difference of opinion, however, prevailed on the question, whether it was allowable to prove the handwriting in *modern* documents, by the testimony of witnesses whose judgment as to the character of the handwriting had been formed from specimens admitted to be genuine, and shewn to them with a view of enabling them to form such opinion. In *Stanger* v. *Searle*(*u*), where the question turned on the genuineness of the handwriting on a bill of exchange purporting to have been accepted by the defendant, Lord Kenyon refused to allow a witness, an inspector of franks, to compare the disputed handwriting with that on other bills accepted by the defendant, and proved to be in his handwriting; though, in the subsequent case of *Allesbrook* v. *Roach* (*x*), the same judge allowed the jury to compare a suspected signature with others admitted to be authentic. In a more recent case of *Clermont* v. *Tullidge*(*y*), a witness for the plaintiff stated that he was in the habit of writing letters for the plaintiff, and he admitted that one put into his hand was written by him by the direction of the plaintiff, and signed by her. The defendant's counsel then put another letter into his hand, which he said was not written by him, and that he did not believe it was written or signed by the plaintiff. Another witness having been called for the plaintiff, Lord Tenterden held that the defendant's counsel could not shew him both letters, and ask whether in his belief they were not both in the same handwriting.

But the whole subject afterwards underwent a complete investigation in the case of *Doe* d. *Mudd* v. *Suckermore*(*z*), which is the leading case on the rules of evidence respecting handwriting. In that case the question turned

(*u*) 1 Esp. 14.
(*x*) 1 Esp. 351.
(*y*) 4 Car. & P. 1.
(*z*) 5 A. & E. 703.

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on the due execution of a will, and the three attesting witnesses were called. It was supposed that one of them, S., was deceived in swearing to his own attestation, and that, although he had attested a will for the testator, the document produced was not that will, but a forgery, and that the attestation was in truth a counterfeit. Upon his cross-examination, two signatures, purporting to be his, and to have been subscribed to depositions made by him in proceedings relating to the same will in another court, but not produced on the present occasion, and also sixteen or eighteen signatures, apparently his, were shewn to him, and he said he believed they were all in his handwriting. The cause having been adjourned, on a subsequent day another witness was called by the other side—an inspector at the Bank, professing to have knowledge and skill in handwriting, who deposed that he had during the progress of the trial made an examination of the signatures admitted by S., and by that means, and that means only, acquired a knowledge of the character of his handwriting, to enable him to speak to the genuinenesss of the attestation on the supposed will. This evidence was objected to as being proof of handwriting by comparison, and as such rejected by Vaughan, J.; and the judges of the Court of Queen's Bench, after hearing the question fully argued on a rule for a new trial, differed in opinion. Lord Denman, C. J., and Williams, J., thought the evidence receivable, and argued as follows:—Admitting the existence of the rule excluding proof of handwriting by comparison—concerning the abstract propriety of which much doubt might exist—the present case did not fall strictly within it; and a rule so objectionable in itself ought not to be extended by construction or inference. No difference in principle existed between the present case and those of *Smith* v. *Sainsbury* (*a*), *Earl Ferrers* v.

(*a*) 5 C. & P. 196.

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Shirley (*b*), and others, where witnesses were allowed to form their opinion of handwriting from correspondence or having casually seen the handwriting of the party. The witness here appeared, not in the light of an ordinary person called on to place the doubtful papers in juxtaposition, and so compare them, but of a scientific individual, called on to give to the jury the benefit of his skill; in which case *Burr* v. *Harper* (*c*), and the numerous cases relative to the proof of ancient documents, shewed that the recency of the period when his knowledge of the handwritlng was acquired could make no difference. But even supposing this evidence were to be considered equivalent to a comparison of handwriting, still the reasons for objecting to it as such would not apply in the present case; for the documents having been admitted by the first witness to be of his handwriting, no collateral issue could be raised upon them; which distinguished the case from that of *Stanger* v. *Searle* (*d*), and brought it within that of *Allesbrook* v. *Roach* (*e*). Patteson and Coleridge, JJ., on the other hand, thought the evidence rightly rejected. It differed from the knowledge of handwriting obtained by correspondence, &c., in this essential point, namely, the undesignedness of the manner in which, in the latter cases, the knowledge is obtained. In such cases the letters from which the opinion of the witness is formed are letters written in the course of business, &c., without reference to their serving as evidence for a collateral purpose in future proceedings. It was admitted, in argument at the bar, to have been the uniform practice for many years to reject such evidence as this; and rightly so, for it was in substance proof of handwriting by comparison; and with respect to the fact of the first witness having admitted the genuineness of the specimens, it would be dangerous to allow parties

(*b*) Fitzg. 195.
(*c*) Holt, N. P. C. 420.
(*d*) 1 Esp. 14.
(*e*) *Id.* 351.

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to the suit to be bound by admissions of that nature. As to *Allesbrook* v. *Roach* (*f*), it must be considered as overruled by *Doe* d. *Perry* v. *Newton* (*g*); and with respect to *Burr* v. *Harper* (*h*), the legality of that decision was at least questionable, but it was never brought under review, the verdict having been against the party in whose favour it was given. They considered *Stanger* v. *Searle* (*i*) and *Clermont* v. *Tullidge* (*k*) as authorities in point. The court being thus equally divided in opinion, the rule for a new trial was of course discharged. The decision in the *Fitzwalter peerage case*, already referred to (*l*), seems to support the view of the two judges who, in *Doe* d. *Mudd* v. *Suckermore*, were for rejecting this kind of evidence.

Testing evidence of witnesses by irrelevant documents.

§ 244. It was also made a question, whether, when a witness had deposed to his belief respecting the genuineness or otherwise of handwriting, it was competent to test his knowledge and credit by shewing him other documents, not admissible as evidence in the cause, nor proved to be genuine, and asking him whether they were in the same handwriting as the disputed one (*m*).

Alterations introduced by statutes 17 & 18 Vict. c. 125, and 28 Vict. c. 18.

§ 245. The difficulties attending the admission of proof of handwriting by comparison on the one hand, and its exclusion on the other, have been already noticed (*n*). The Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125, introduced as a remedy the following middle course in civil cases. Sect. 27 enacts, "Comparison of a disputed writing with any writing proved to the satisfaction of the judge to be genuine,

(*f*) 1 Esp. 351.
(*g*) 5 A. & E. 514.
(*h*) Holt, N. P. C. 420.
(*i*) 1 Esp. 14.
(*k*) 4 C. & P. 1.
(*l*) See *ante*, § 241.
(*m*) See *Hughes* v. *Rogers*, 8 M. & W. 123; *Griffits* v. *Ivery*, 11 A. & E. 322; *Young* v. *Honner*, 2 Moo. & R. 536.
(*n*) *Suprà*, § 238.

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shall be permitted to be made by witnesses; and such writings, and the evidence of witnesses respecting the same, may be submitted to the court and jury as evidence of the genuineness, or otherwise, of the writing in dispute." By sect. 103, this enactment applies to every court of civil jurisdiction. The 28 Vict. c. 18, ss. 1, 8, extends this provision to criminal cases.

Scientific evidence that writing is in a feigned hand, &c.

§ 246. In order to *disprove* handwriting, evidence has frequently been adduced of persons who have made it their study, and who, though unacquainted with that of the supposed writer, undertake, from their general knowledge of the subject, to say whether a given piece of handwriting is in a feigned hand or not. Much difference of opinion has prevailed relative to the admissibility of this sort of evidence. It was received by Lord Kenyon and the Court of Queen's Bench, on a trial at bar, in *Goodtitle* d. *Revett* v. *Braham* (*o*); but rejected by the same judge in *Cary* v. *Pitt* (*p*), on the ground that, although he had in the former case received the evidence, he had laid no stress upon it in his address to the jury. Similar evidence was, however, afterwards admitted by Hotham, B., in *R.* v. *Cator* (*q*); and it has also been received in the ecclesiastical courts (*r*). The principal case on the subject, however, is that of *Gurney* v. *Langlands* (*s*), which was an issue directed to try the genuineness of the handwriting to a warrant of attorney, where an inspector of franks was called as a witness, and asked, "From your knowledge of handwriting, do you believe the handwriting in question to be a genuine signature, or an imitation?" This was rejected by Wood, B.; and, on a motion for a new trial, Chief Justice Abbott said, "I have long been of

(*o*) 4 T. R. 497.
(*p*) Peake's Ev. App. xxxiv.
(*q*) 4 Esp. 117.
(*r*) *Saph* v. *Atkinson*, 1 Add. Eccl. R. 216; *Beaumont* v. *Perkins*, 1 Phillim. 78.
(*s*) 5 B. & A. 330.

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opinion, that evidence of this description, whether in strictness of law receivable or not, ought, if received, to have no great weight given to it. * * * The other evidence in this case was of so cogent a description, as to have produced a verdict satisfactory to the judge who tried the cause; and I can pronounce my judgment much more to my own satisfaction upon a verdict so found, than if this evidence had been admitted, and had produced a contrary verdict. For I think it much too loose to be the foundation of a judicial decision, either by judges or juries." And Holroyd, J., said, "I have great doubt whether this is legal evidence; but I am perfectly clear that it is, if received, entitled to no weight." Bayley and Best, JJ., concurring, the rule was refused. A somewhat similar notion seems to have found its way to Doctors' Commons, where Sir J. Nicholl is reported to have declined the offer of a glass of high power, used by professional witnesses of this kind, to examine the handwriting and see if the letters were what is commonly termed *painted;* adding that, in his opinion, the fact of their being painted was in itself an extremely trivial circumstance (*t*). This is carrying matters a great way, and farther than is usual in courts of common law, which never reject the artificial aid of glasses or lamps, where they can be of assistance in the investigation of truth. That scientific evidence of the nature in question may, in the language of C. J. Abbott, "be much too loose to be the foundation of a judicial decision," may be perfectly true; but to declare it *inadmissible* as an adminiculum of testimony is rather a strong position. Indeed, its admissibility seems to be recognized in the more recent cases of the *Fitzwalter peerage* (*u*), the *Tracy peerage* (*x*) and *Newton* v. *Rick-*

(*t*) *Robson* v. *Rocke*, 2 Add. E. R. 88, 89. See also *Constable* v. *Steibel*, 1 Hagg. N. R. 61, 62; and *In the goods of Oppenheim*, 17 Jur. 306.

(*u*) 10 Cl. & F. 198.

(*x*) *Id.* 154.

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etts (*y*); and, according to the present practice, it is generally received without objection. The *Tracy peerage* case also shews, that the evidence of persons whose occupation makes them conversant with MSS. of different ages, is receivable to prove that a given piece of handwriting is of a particular date.

Infirmative circumstances affecting all proof of handwriting by resemblance.

§ 247. Whatever may be the relative values of the several modes of proving handwriting which have been discussed in this chapter, when compared with each other, it is certain that all such proof is even in its best form precarious, and often extremely dangerous (*z*). "On a forgotten matter we can hardly make distinction of our hands" (*a*). "Many persons," it has been well remarked, "write alike; having the same teacher, writing in the same office, being of the same family, all these produce similitude in handwriting, which in common cases, and by common observes, is not liable to be distinguished. The handwriting of the same person varies at different periods of life: it is affected by age, by infirmity, by habit" (*b*). The two following instances

(*y*) 9 H. L. Ca. 262.

(*z*) Huberus, Præl. Jur. Civ. lib. 22, tit. 4, n. 16; Wills, Circ. Ev. 111, 3rd Ed.; and see the judgment of Sir J. Nicholl in *Robson* v. *Rocke*, 2 Add. Eccl. Rep. 79.

(*a*) Twelfth Night, Act 2, Scene 3.

(*b*) Per Adam, arguendo, in *R.* v. *Mr. Justice Johnson*, 29 Ho. St. Tr. 475. See also, per Sir J. Nicholl in *Constable* v. *Steibel*, 1 Hagg. N. R. 61. "Literarum dissimilitudinem sæpe quidem tempus facit, non enim ita quis scribit juvenis et robustus, ac senex et forte tremens, sæpe autem et languor hoc facit: et quidem hoc dicimus, quando calami et atramenti immutatio, similitudinis per omnia aufert puritatem." Nov. LXXIII. Præf. See the able article "Autography," in Chambers' Edinb. Journal for July 26, 1845, where it is said, "Men of business acquire a mechanical style of writing, which obliterates *all natural characteristics*, unless in instances where the character is so strongly individual as not to be modified into the general mass. In the present day, all *females* seem to be taught after one model. In a great proportion the handwriting is moulded on this particular model, &c. We often find that the style of handwriting is *hereditary*, &c. &c."

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shew the deceptive nature of this kind of evidence. The first is related by Lord Eldon, in the case of *Eagleton* v. *Kingston* (*c*). A deed was produced at a trial, purporting to be attested by two witnesses, one of whom was Lord Eldon. The genuineness of the document was strongly attacked; but the solicitor for the party setting it up, who was a most respectable man, had every confidence in the attesting witnesses, and had in particular compared the signature of Lord Eldon to the document, with that of pleadings signed by him. Lord Eldon however had never attested a deed in his life. The other case occurred in Scotland, where, on a trial for the forgery of some bank notes, one of the banker's clerks whose name was on a forged note swore distinctly that it was his handwriting, while he spoke hesitatingly with regard to his genuine subscription (*d*). Standing alone, any of the modes of proof of handwriting by resemblance are worth little—in a criminal case nothing—their real value being as adminicula of testimony. But still if the defendant does not produce evidence to disprove that which is adduced on behalf of the plaintiff, this raises an additional presumption in favour of the latter. Slight evidence, uncontradicted, may become cogent proof.

Ancient practice respecting the proof of handwriting by resemblance.

§ 248. Our ancient lawyers appear to have used the expression. "comparison, or similitude of handwriting," in its more proper and enlarged sense; as designating any species of presumptive proof of handwriting by resemblance—either comparison with a standard previously created in the mind ex visu scriptionis or ex scriptis olim visis, or direct comparison in the modern sense of the word—and to have considered that any of those modes of proof was admissible in civil, and none

(*c*) 8 Ves. 476.

(*d*) *Case of Carsewell*, Glasgow, 1791; cited Burnett's Crim. Law of Scotland, 502; Wills, Circ. Ev. 112, 3rd Ed.

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of them in criminal cases (*e*). This latter distinction was, however, abandoned in modern times until its partial revival by the Common Law Procedure Act, 1854 (*f*); but since the 28 Vict. c. 18, ss. 1 and 8, may be looked on as completely at an end.

(*e*) See the note to *Doe* d. *Mudd* v. *Suckermore*, 5 A. & E. 703, 752; and it seems to have been on this principle that the attainder of Algernon Sidney, in 1683, was reversed by statute. His trial and the statute will be found in 9 Ho. St. Tr. 817, 996.

(*f*) 17 & 18 Vict. c. 125, s. 27; *suprà*, § 245.

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BOOK III.

RULES REGULATING THE ADMISSIBILITY AND EFFECT OF EVIDENCE.

PRIMARY *and* SECONDARY *Rules of Evidence.*

Primary and *secondary* rules of evidence.

§ 249. THE rules regulating the admissibility and effect of evidence are of two kinds—PRIMARY and SECONDARY: the former relating to the *quid probandum*, or thing to be proved; the latter to the *modus probandi*, or mode of proving it. They will be considered in two separate Parts.

PART I.

THE PRIMARY RULES OF EVIDENCE.

The *primary* rules of evidence.

§ 250. THE PRIMARY rules of evidence may all be ranged under three heads, in which we accordingly propose to examine them.

1. To what subjects evidence should be directed.
2. The burden of proof, or onus probandi.
3. How much must be proved.

These rules, as stated in a former part of this work (*a*), have their basis in universally recognized principles of natural reason and justice; but owe the shape in which they are actually found, and the extent to which they prevail, to the artificial reason and policy of law.

(*a*) Bk. 1, pt. 2, § 111.

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Chapter I.

TO WHAT SUBJECTS EVIDENCE SHOULD BE DIRECTED.

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Evidence should be directed and confined to the matters which are in dispute, or form the subject of investigation.

§ 251. Of all rules of evidence, the most universal and the most obvious is this—that the evidence adduced should be alike directed and confined to the matters which are in dispute, or form the subject of investigation. The theoretical propriety of this rule never can be matter of doubt, whatever difficulties may arise in its application. The tribunal is created to determine matters which either are in dispute between contending parties or otherwise require proof; and anything which is neither directly nor indirectly relevant to those matters, ought at once to be put aside as beyond the jurisdiction of the tribunal, and as tending to distract its attention and to waste its time. "Frustrà probatur quod probatum non relevat" (*a*). "Evidence to the jury," says Finch (*b*), "is anything whatsoever which serves the party to prove the issue for him: but that which does not warrant the issue, is void; as in a formedon, and the gift traversed, the demandant shall not give in evidence another donor." So on the trial of an indictment for stealing the property of A., and also for receiving it knowing it to have been stolen; evidence of possession by the prisoner, of other property stolen from other persons at other times, was not admissible at common law to prove either the stealing or the receiving (*c*).

(*a*) Broom's Maxims, xxix. 4th Ed.; Halk. Max. 50. "La liberté d'alléguer et de prouver des faits, ne s'étend pas à toutes sortes de faits indistinctement; mais le juge ne doit recevoir la preuve que de ceux qu'on appelle pertinens; c'est-à-dire dont on peut tirer des conséquences qui servent à établir le droit de celui qui allégue ces faits: et il doit au contraire rejeter ceux dont la preuve, quand ils seroient véritables, seroit inutile." Domat, Lois Civiles, &c. Part 1, liv. 3, tit. 6, sect. 1, § 10.

(*b*) Finch, Comm. Laws, 61 b.

(*c*) *R.* v. *Oddy*, 2 Den. C. C. 264. But now, by the 32 & 33 Vict. c. 99, s. 11, "where proceedings are taken against any person for having in his possession stolen goods, evidence may be given, that there were found in the possession of such person, other goods stolen within the preceding period of twelve months," for the purpose of proving the offence.

2 Leach 1 C.C.Res 272.

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Twofold grounds of irrelevancy of evidence.

§ 252. Evidence may be rejected as irrelevant for one of two reasons. 1st. That the connexion between the principal and evidentiary facts is too remote and conjectural. 2nd. That it is excluded by the state of the pleadings, or what is analogous to the pleadings; or is rendered superfluous by the admissions of the party against whom it is offered. The use of pleadings, or analogous statements of contending parties, is to enable the tribunal to see the points in dispute, and the parties to know beforehand what they should come prepared to attack or defend: consequently, although a piece of evidence tendered might, if merely considered per se, establish a legal complaint, accusation, or defence; yet, as the opposite party has had no intimation beforehand that that ground of complaint, &c. would be insisted on, the adducing evidence of it against him would be taking him by surprise and at a disadvantage. Hence the maxim of pleading, "Certa debet esse intentio et narratio, et certum fundamentum, et certa res quæ deducitur in judicium" (*d*). The discussion of the admissibility of evidence under the various forms of pleading in particular actions, &c., would be wholly inconsistent with the design of this work, and we will therefore confine ourselves to the general question; before proceeding to which, however, it is important to observe that there are certain matters which it is unnecessary to prove, *i. e.* 1. Matters noticed by the courts *ex officio*. 2. Matters deemed *notorious*. "Lex non requirit verificare quod apparet curiæ" (*e*). "Quod constat curiæ opere testium non indiget" (*f*).

Matters unnecessary to be proved.

1. Matters noticed by the courts ex officio.

§ 253. 1. An enumeration of the matters which the courts, in obedience to common or statute law, notice ex officio, would here be out of place (*g*). Suffice it to

(*d*) Co. Litt. 303 a. See also 5 Co. 61 a; Jenk. Cent. 2, Cas. 64.

(*e*) 9 Co. 54 b.

(*f*) 2 Inst. 662.

(*g*) A large number will be found collected in Tayl. Evid.

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say generally, that, besides noticing the ordinary course of nature, seasons, times, &c., the courts notice without proof various political, judicial, and social matters. Thus, they notice the political constitution of our own government; the territorial extent of the jurisdiction and sovereignty exercised de facto by it; the existence and titles of other sovereign powers; the jurisdiction of the superior courts, and courts of general jurisdiction; the seals of the superior courts, and of many others; the custom or law of the road that horses and carriages shall respectively keep on the left side, &c. &c. In all cases of this kind, where the memory of a judge is at fault, he resorts to such documents or other means of reference as may be at hand, and he may deem worthy of confidence (*h*). Thus, if the point at issue be a date, the judge will refer to an almanack (*i*). The *printed* calendar was used for this purpose at least as early as the 9 Hen. VII. (*k*).

2. Matters deemed notorious.

§ 254. 2. The law of England is very slow in recognizing matters as too notorious to require proof (*l*), and it is not easy to lay down a definite rule respecting them. In *Richard Baxter's* case, in 1685 (*m*), the defendant was charged with having published a seditious libel; and Jefferies, C. J., is reported to have told the jury,— "It is *notoriously* known there has been a design to ruin the king and nation; the old game has been renewed, and this" (the defendant) "has been the main incendiary." The iniquity of such a direction as this, supposing it correctly reported, needs no comment. The language of Wilde, C. J., in the case of *Ernest Jones* (*n*), who was indicted for making a seditious

part 1, ch. 2, 5th Ed., and 1 Phill. Ev. ch. 10, sect. 1, 10th Ed.

(*h*) 1 Greenl. Ev. § 6, 7th Ed.; Tayl. Ev. § 20, 3rd Ed.

(*i*) *Id.*, and see *Sutton* v. *Darke*, 5 H. & N. 647, 649.

(*k*) Hil. 9 H. VII., 14 B. pl. 1.

(*l*) See Introd. pt. 2, § 38.

(*m*) 11 Ho. St. Tr. 501.

(*n*) Centr. Cr. Court, 1841, MS.

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speech at a public meeting, seems to throw some light on this subject. The Lord Chief Justice there told the jury, that they should take into consideration what they knew of the state of the country and of society generally, at the time when the language was used. What might be innoxious at one time, when there was a general feeling of contentment, might be very dangerous at another time when a different feeling prevailed. But that they could not, without proof of them, take into their consideration particular facts attending the particular meeting at which the words were spoken. And this seems confirmed by a case of *R.* v. *Dowling* decided the same year (*o*).

Evidence rejected for remoteness.

§ 255. The rejection of evidence on the ground of remoteness, or want of reasonable connexion between the principal and evidentiary facts, has been shewn in another place to be a branch of that fundamental principle of our law, which requires the best evidence to be adduced (*p*). The rule has obviously no application where the evidence tendered is either *direct*, or, though circumstantial, is *necessarily* conclusive upon the issue. But whether a given piece of *presumptive* evidence is receivable, or ought to be rejected on this ground, is not unfrequently a question of considerable difficulty. Some instances illustrative of this have already been given (*q*), to which may be added the following. On a question between landlord and tenant as to the terms on which the premises were held, although it might assist to know the terms on which the landlord usually let to his other tenants, not connected with the tenant whose case is under consideration, the evidence would

Only applicable to *presumptive* evidence.

Instances.

(*o*) MS., cited Arch. Cr. Pl. 147, 15th Ed., Centr. Cr. Court. See further *Moody* v. *The London and Brighton Railw. Co.*, 1 B. & S. 290, 293; *Parker* v. *Green*, 2 *Id.* 299; *Holcombe* v. *Hewson*, 2 Camp. 391.

(*p*) Bk. 1, pt. 1, §§ 88, 90 *et seq.*

(*q*) *Id.*, § 92.

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be rejected as too remote (*r*). So in an action for goods sold and delivered, to which the defence was that the sale was subject to a certain condition, it was held not competent to the defendant to call witnesses, to prove that the plaintiff had made contracts with other persons subject to that condition (*s*). But acts unconnected with the act in question are frequently receivable to prove psychological facts, such as *intent* (*t*). Thus on an indictment for uttering a forged bank note, evidence is admissible that the accused has uttered similar forged notes, &c. (*u*).

Evidence to character.

§ 256. One of the strongest instances of the beneficial application of the principle in question, is to be found in the rules respecting the admissibility of evidence to character. That the general reputation and previous conduct of a litigant party or witness, is often of immense weight as natural or moral evidence, as tending to raise a presumption that his action or defence is well or ill founded, or that the evidence which he gives is true or false, must be obvious. But on the other hand, the exposing every man who comes into our courts of justice, to have every action of his life publicly scrutinized, would keep most men out of them (*x*). To admit character evidence in every case, or to reject it in every case, would be equally fatal to justice; and to draw the line—to define with precision where it ought to be received, and where it ought to be rejected—is as embarrassing a problem as any legislator can be called upon to solve (*y*).

(*r*) *Carter* v. *Pryke*, 1 Peake, 95. See *Spenceley* v. *De Willett*, 7 East, 110.

(*s*) *Hollingham* v. *Head*, 4 C. B., N. S. 388.

(*t*) *R.* v. *Weeks*, 1 Leigh & C. 18.

(*u*) *Infrà*, pt. 2, ch. 1.

(*x*) Fost. Cr. Law, 246.

(*y*) Even Bentham, 3 Jud. Ev. 193, admits the difficulties of this subject, and says that some of them seem scarce capable of receiving solution but in the Gordian style.

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Evidence to the character of *parties*. General rule—not receivable.

§ 257. With respect to the character of *parties* to a cause, the law of England meets the difficulty by taking a distinction between cases where their character ought to be supposed in issue, and where it ought not. According to the general rule, upon the whole probably a just one, it is not competent to give evidence of the general character of the parties to forensic proceedings, much less of particular facts not in issue in the cause, with the view of raising a presumption either favourable to one party or disadvantageous to his antagonist (*z*). This principle has been carried so far that, on a prosecution for an infamous offence, evidence of an admission by the accused that he was addicted to the commission of similar offences, was rejected as irrelevant (*a*).

Exception—When the character of a party is in issue by the proceedings.

§ 258. But where the very nature of the proceedings is to put in issue the character of any of the parties to them, a different rule necessarily prevails; and it is not only competent to give general evidence of the character of the party with reference to the issue raised, but even to inquire into particular facts tending to establish it (*b*). Thus, on an indictment for keeping a *common* bawdy-house, or *common* gaming-house (*c*), or for being a *common* barretor (*d*), the prosecutor may give in evidence any acts of the defendant which support the general charge. So, where the issue is whether a party is non compos mentis, proof may be adduced of particular

(*z*) Phill. & Am. Ev. 488—91; 1 Phill. Ev. 502–508, 10th Ed.; *King* v. *Francis*, 3 Esp. 117, per Lord Kenyon.

(*a*) *R.* v. *Cole*, Mich. 1810, by all the judges; Phill. & Am. Ev. 499; 1 Phill. Ev. 508, 10th Ed.

(*b*) Bull. N. P. 295.

(*c*) *Clark* v. *Periam*, 2 Atk. 339.

(*d*) 2 Stark. Ev. 304, 3rd Ed. In cases of barretry, however, notice must be given to the defendant, of the particular acts of barretry intended to be relied on at the trial; *Id.*; B. N. P. 296; *Goddard* v. *Smith*, 6 Mod. 261, 262; *R.* v. *Rowton*, 1 Leigh & C. 520, 542, per Willes, J.

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acts of insanity (*e*). In actions for seduction (*f*), and criminal conversation (*g*), while that species of action existed (*h*), the character of the female for chastity is directly in issue, and may be impeached either by general evidence of misconduct, or proof of particular acts of it. So, a charge of rape (*i*), or of assault with intent to commit rape (*k*), brings the question of the chastity of the female so far in issue, that it is competent to the accused to give general evidence of her previous bad character in this respect; or even to show that she has been criminally connected with himself (*l*). But the authorities are not agreed as to whether, and under what circumstances, he will be allowed to prove particular acts of unchastity committed by her with other men (*m*).

Evidence to the character of the accused in criminal prosecutions.

§ 259. Although, in criminal prosecutions in general, the character of the accused is not in the first instance put in issue, still, in all cases where the direct object of the proceedings is to punish the offence; such as indictments for treason, felony, or misdemeanor (*n*);—and is not merely the recovery of a penalty (*o*),—it is competent to him to defend himself by proof of previous

(*e*) *Clark* v. *Periam*, 2 Atk. 340.

(*f*) Phill. & Am. Ev. 488, 489; 1 Phill. Ev. 503, 10th Ed.; *Bamfield* v. *Massey*, 1 Camp. 460; *Dodd* v. *Norris*, 3 Camp. 519; *Verry* v. *Watkins*, 7 C. & P. 308.

(*g*) B. N. P. 296; 1 Selw. N. P. 26, 9th Ed.; *Elsam* v. *Faucett*, 2 Esp. 562, per Lord Kenyon, C. J.; *R.* v. *Barker*, 3 C. & P. 589, per Park, J.

(*h*) See bk. 2, pt. 1, ch. 2, § 182.

(*i*) Phill. & Am. Ev. 489; 1 Phill. Ev. 505, 10th Ed.; *R.* v. *Martin*, 6 C. & P. 562; *R.* v. *Barker*, 3 C. & P. 589.

(*k*) Phill. & Am. Ev. 489; 1 Phill. Ev. 505, 10th Ed.; *R.* v. *Clarke*, 2 Stark. 244.

(*l*) *R.* v. *Martin*, 6 C. & P. 562; *R.* v. *Aspinall*, 3 Stark. Ev. 952, 3rd Ed.

(*m*) See Tayl. Evid. §§ 336 and 1296, 4th Ed.

(*n*) 2 Stark. Ev. 304, 3rd Ed.; Phill. & Am. Ev. 490; 1 Phill. Ev. 506, 10th Ed.

(*o*) Phill. & Am. Ev. 488; 1 Phill. Ev. 502, 10th Ed. See also *Att.-Gen.* v. *Radloff*, 10 Exch. 84.

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good character, reference being had to the nature of the charge against him. "On a charge of stealing," says a well known treatise on the Law of Evidence (*p*), "it would be irrelevant and absurd to inquire into the prisoner's loyalty or humanity; on a charge of high treason, it would be equally absurd to inquire into his honesty and punctuality in private dealings. Such evidence relates to principles of moral conduct which, however they might operate on other occasions, would not be likely to operate on that which alone is the subject of inquiry; it would not afford the least presumption that the prisoner might not have been tempted to commit the crime for which he is tried, and is therefore totally inapplicable to the point in question."

Nature of character evidence liable to be misunderstood.

§ 260. Few subjects are more liable to be misunderstood than character evidence. On an indictment for stealing from A., for instance, proof that on other occasions, wholly unconnected with the transaction in question, the accused acted the part of an honest, or even liberal and high-minded man, in certain transactions with B. and C.,—even assuming that it would to a certain extent render improbable the supposition of his having acted with felonious dishonesty towards A., —is too remote and insignificant to be receivable in evidence: the inquiry should be as to his *general* character among those who have known him, with a view of shewing that his *general* reputation for honesty is such as to render unlikely the conduct imputed to him. And even the individual opinion of a witness, founded on his own personal experience of the disposition of the accused, is inadmissible (*q*). "It frequently occurs, indeed," says the author last quoted, "that witnesses, after speaking to the general opinion of the prisoner's

(*p*) Phill. & Am. Ev. 490, 491; 1 Phill. Ev. 506, 10th Ed.

(*q*) *R.* v. *Rowton*, 34 L. J., M. C. 57; 1 Leigh & C. 520: by eleven judges against two.

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character, state their personal experience and opinion of his honesty; but when this statement is admitted, it is rather from favour to the prisoner, than strictly as evidence of general character" (*r*).

May be contradicted.

§ 261. Whenever it is allowable to impeach the character of a party, it is competent to the other side to give evidence to contradict the evidence adduced (*s*). And although, in a criminal prosecution, evidence cannot in the first instance be given to shew that the accused has borne a bad character; still, if he sets up his character as an answer to the charge against him, he puts it in issue, and the prosecutor may encounter his evidence either by cross-examination or contrary testimony (*t*). In *R.* v. *Wood* (*u*), the prisoner, who was indicted for a highway robbery, called a witness, who deposed to having known him for years, during which time he had, as the witness said, borne a good character. On cross-examination it was proposed to ask the witness, whether he had not heard that the prisoner was *suspected* of having committed a robbery which had taken place in the neighbourhood some years before. This was objected to, as raising a collateral issue: but Parke, B., overruled the objection, saying, "The question is not whether the prisoner was *guilty* of that robbery, but whether he was *suspected* of having been implicated in it. A man's character is made up of a number of small circumstances, of which his being suspected of misconduct is one." The question was accordingly put, and the prisoner convicted.

(*r*) Phill. & Am. Ev. 491; 1 Phill. Ev. 506, 10th Ed.

(*s*) *R.* v. *Murphy*, 19 Ho. St. Tr. 724; B. N. P. 296; *R.* v. *Clarke*, 2 Stark. 241; *Bamfield* v. *Massey*, 1 Camp. 460; *Dodd* v. *Norris*, 3 Camp. 519.

(*t*) *R.* v. *Rowton*, 34 L. J., M. C. 57; 1 Leigh & C. 520, overruling *R.* v. *Burt*, 5 Cox, Cr. Cas. 284. See also 2 Stark. Ev. 304, 3rd Ed.; Bull. N. P. 296; 2 Russ. Cr. 786, 3rd Ed.

(*u*) Kent Sp. As. 1841; MS., and 5 Jurist, 225.

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But, as it is not competent for the accused to shew particular acts of good conduct, the prosecutor cannot go into particular cases of misconduct. Exceptions to this rule have been introduced by statute. The 6 & 7 Will. 4, c. 111, enacts, that if upon the trial of any person for any subsequent *felony not punishable with death* he shall give evidence of his good character, it shall be lawful in answer thereto to give evidence of his conviction for a previous *felony*. The subsequent act, 14 & 15 Vict. c. 19, s. 9, provided, that if, upon the trial of any person for a subsequent offence, such person should give evidence of his good character, it should be lawful for the prosecutor, in answer thereto, to give evidence of the conviction of such person for a previous offence or offences. This statute was repealed by 24 & 25 Vict. c. 95; and its provisions have been re-enacted by 24 & 25 Vict. c. 96, s. 116, as to larceny and similar offences, and by 24 & 25 Vict. c. 99, s. 37, as to offences against the coin; but the 24 & 25 Vict. c. 97, relating to malicious injuries to property, c. 98, relating to forgery, and c. 100, relating to offences against the person, contain no similar provision. It was equally within the 14 & 15 Vict. c. 19, s. 9, whether the evidence to character was given by witnesses called on the part of the accused, or extracted by cross-examination from witnesses for the prosecution (*x*). In practice we seldom see evidence adduced, to rebut evidence as to character, although it is apprehended that the interests of justice would be advanced if it were done more frequently.

But not encountered by proof of particular acts.

Exceptions.

§ 262. Witnesses to the characters of parties are in general treated with great indulgence—perhaps too much. Thus, it is not the practice of the bar to cross-examine such witnesses unless there is some specific

Witnesses to the character of parties treated with great indulgence.

(*x*) *R.* v. *Shrimpton*, 2 Den. C. C. 319; 3 Car. & K. 373.

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charge on which to found a cross-examination (*y*), or at least without giving notice of an intention to cross-examine them if they are put in the box; the judges discourage the exercise of the undoubted right of prosecuting counsel to reply on their testimony (*z*); and the most obvious perjury in giving false characters for honesty, &c., is every day either overlooked or dismissed with a slight reprimand. But surely this is mercy out of place. If mendacity in this shape is not to be discouraged, tribunals will naturally be induced either to look on all character evidence with suspicion, or to attach little weight to it. Now there are many cases in which the most innocent man has no answer to oppose to a criminal charge but his reputation; and to deprive this of any portion of the weight legitimately due to it, is to rob the honest and upright citizen of the rightful reward of his good conduct. In this, as in many other instances, the old legal maxim holds good, "Minatur innocentes qui parcit nocentibus" (*a*). It has accordingly happened that judges, knowing from experience how little weight is due to the character evidence so often received, have occasionally told juries that character evidence is not to be taken into consideration unless a doubt exists on the other evidence—a position perfectly true in the sense that, if, on the facts, the jury believe the accused guilty, to acquit him out of regard for his good character would be a violation of their oath; but utterly false and illegal, if its meaning be, that character evidence is not to be considered until the guilt or innocence of the accused is first determined on the facts. The use of character evidence is to assist the jury in estimating the value of the evidence brought against

(*y*) *R.* v. *Hodgkiss*, 7 C. & P. 298.

(*z*) *R.* v. *Stannard*, 7 C. & P. 673. That the right exists, see that case, and the Resolutions of the judges, 7 C. & P. 676, Res. 4, and *R.* v. *Whiting*, 7 C. & P. 771.

(*a*) 4 Co. 45 a. See also Jenk. Cent. 3, Cas. 54.

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the accused; and we cannot dismiss this subject without directing attention to the shrewd observations of C. J. Holt (*b*): "A man is not born a knave; there must be time to make him so, nor is he presently discovered after he becomes one. A man may be reputed an able man this year, and yet be a beggar the next."

Evidence to the character of *witnesses.*

§ 263. With respect to the character of *witnesses.* The *credibility* of a witness is always in issue; and accordingly general evidence is receivable, to show that the character which he bears is such that he is unworthy to be believed, even when upon his oath (*c*). But evidence of particular facts, or particular transactions, cannot be received for this purpose; both for the reasons already assigned (*d*), and also because it would raise a collateral issue, i. e., an issue foreign to that which the tribunal is sitting to try (*e*). The witness may indeed be *questioned* as to such facts or transactions, but he is not always bound to *answer;* and if he does, the party questioning must take his answer and cannot call evidence to contradict it (*f*). A change in the law on this subject was made as to civil cases, by the 17 & 18 Vict. c. 125, s. 25, which enacts, "A witness in any cause may be questioned as to whether he has been convicted of any felony or misdemeanor, and, upon being so questioned, if he either denies the fact, or refuses to answer, it shall be lawful for the opposite party to prove such conviction; and a certificate containing the substance and effect only (omitting the formal part) of the indictment and conviction for such offence, purporting to be signed by the clerk of the court, or other officer having the custody of the records of the court where

(*b*) *R.* v. *Swendsen,* 14 Ho. St. Tr. 596.

(*c*) *Reg.* v. *Brown,* L. Rep., 1 C. C. 70.

(*d*) §§ 256, 260, 261.

(*e*) 13 Ho. St. Tr. 211; 16 *Id.* 246—7; 32 *Id.* 490—5; B. N. P. 296; Stark. Ev. 237—8, 4th Ed.; *R.* v. *Burke,* 8 Cox, Cr. Cas. 44.

(*f*) *Suprà,* bk. 2, pt. 1, ch. 1.

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the offender was convicted, or by the deputy of such clerk or officer, &c., shall, upon proof of the identity of the person, be sufficient evidence of the said conviction, without proof of the signature or official character of the person appearing to have signed the same." And this provision has since been extended to criminal cases by the 28 Vict. c. 18, ss. 1 and 6.

Evidence not admissible in one point of view, or for one purpose, admissible in or for some other.

1. Evidence not admissible to prove some of the matters in question, admissible to prove others.

2. Evidence not admissible in the first instance may become so by matter subsequent.

§ 264. In determining the relevancy of evidence to the matters in dispute in a cause, it is of the utmost importance to remember that the question is whether the evidence offered is relevant *to any of them*,—as evidence not admissible in one point of view or for one purpose, may be perfectly admissible in some other point of view, or for some other purpose. 1. Evidence not admissible to prove some of the issues or matters in question, may be admissible to prove others—evidence not admissible *in causâ* may be most valuable as evidence *extra causam;* and evidence not receivable either in proof of the facts in dispute, or to test the credit of witnesses, &c., may be important as shewing the amount of damage sustained by a plaintiff, &c. 2. Evidence not admissible in the first instance may become so by matter subsequent. Thus, in a suit between A. and B., the acts or declarations of C. are primâ facie not evidence against B., and ought to be rejected; but if it be shewn that C. was the lawfully constituted agent of B., either generally, or with respect to the special matter in question, his acts or declarations become evidence against his principal. So a litigant party may, by his mode of conducting his case, render that evidence for his adversary which otherwise would not be so. Thus, although a man's own verbal or written statement cannot be used as evidence for him, yet if his adversary puts such a statement in evidence against him, he is entitled to have the whole read, and the jury may estimate the probability of any part of it

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which makes in his favour. 3. Evidence may be admissible to prove a subalternate principal fact, which might not be admissible to prove the immediate fact in issue. This is of course subject to the rule requiring the best evidence; for the connexion between the subalternate principal fact and the ultimate evidentiary fact must be as open, visible, and unconjectural in its nature, as that between the subalternate principal fact and the fact directly in issue. In all cases, as has been well observed, the ultimate presumption must be connected either mediately or immediately with facts established by proof(*g*).

3. Evidence admissible to prove subalternate principal facts.

(*g*) 2 Ev. Poth. 332.

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Chapter II.

THE BURDEN OF PROOF.

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The burden of proof, or onus probandi.

§ 265. The burden of proof, or onus probandi, is governed by certain rules, having their foundation in principles of natural reason, to which an artificial weight is superadded by the reason and policy of law (*a*); and in order to form clear notions on this subject, the best course will be to consider it, first, in the abstract, and afterwards as connected with jurisprudence.

Natural principles by which it is governed.

§ 266. Every controversy ultimately resolves itself into this, that certain facts or propositions are asserted by one of the disputant parties, which are denied, or at least not admitted, by the other. Now, where there are no antecedent grounds for supposing that what is asserted by the one party, is more probable than what is denied

(*a*) Introd. pt. 2, § 42.

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by the other, and the means of proof are equally accessible to both, the party who asserts the fact or proposition must prove his assertion,—the burden of proof, or onus probandi, lies upon him; and the party who denies that fact or proposition, need not give any reason or evidence to shew the contrary, until his adversary has at least laid some probable grounds for the belief of it. The reason for this is clear. On all matters which are not the subject either of intuitive or sensitive knowledge, which are either not susceptible of demonstration, or are not demonstrated, and which are not rendered probable by experience or reason, the mind suspends its assent until proof is adduced; and where effective proofs are in the power of a party who refuses or neglects to produce them, that naturally raises a presumption that those proofs, if produced, would make against him. It is obvious that, in a complicated controversy, the burden of proving some of the matters in dispute may rest on one of the parties, while the burden of proving the rest may be on his adversary.

Legal rule affecting.

§ 267. One of the causes, as shown in the Introduction to this work, which renders artificial rules of evidence indispensable to municipal law, is the necessity for *speedy action* in tribunals (*b*). In order to do complete justice tribunals must be supplied by law with rules which shall enable them to *dispose*, one way or the other, of all questions which come before them; whatever the nature of the inquiry; or however difficult, or even impossible, it may be to get at the real truth. And as the law takes nature for its model, and works on her basis as far as possible, the best mode of effecting this object is, to attach an artificial weight to the *natural* rules by which the burden of proof is governed, and to enforce its order more strictly than is observed in other contro-

(*b*) Introd. pt. 2, §§ 41, 42.

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versies. Courts of justice are not established for the decision of abstract questions—"Interest reipublicæ ut sit finis litium" (*c*);—and therefore the man who brings another before a judicial tribunal, must rely on the strength of his own right and the clearness of his own proof, and not on the want of right or weakness of proof in his adversary (*d*). Hence the great principle which has been variously expressed by the maxims, "Actori incumbit onus probandi" (*e*); "Actori incumbit probatio" (*f*); "Actore non probante, reus absolvitur" (*g*); "Semper necessitas probandi incumbit illi qui agit" (*h*); "Actore non probante: qui convenitur, etsi nihil ipse præstat, obtinebit" (*i*); "Deficiente probatione remanet reus ut erat antequam conveniretur" (*k*), &c. The plaintiff is bound in the first instance to shew at least a primâ facie case, and if he leaves it imperfect the court will not assist him: "Melior est conditio rei quàm actoris" (*l*); "Favorabiliores rei potiùs quàm actores habentur" (*m*); "Potior est conditio defendentis" (*n*); "Cum sunt partium jura obscura, reo favendum est potiùs quàm actori" (*o*); "In dubio secundùm reum potiùs quàm secundùm actorem litem dari oportet" (*p*); "Semper in obscuris quod minimum est sequimur" (*q*); "In obscuris minimum est sequendum" (*r*), &c. Thus

(*c*) Introd. pt. 2, §§ 41, 43.

(*d*) Vaugh. 60; Show. P. C. 221; 5 T. R. 110 (n.); 1 H. & N. 744; *Midland Railw. Co.* v. *Bromley*, 17 C. B. 372; *Doe* v. *Welsh* v. *Langfield*, 16 M. & W. 497.

(*e*) 4 Co. 71 b.

(*f*) Hob. 103.

(*g*) Bonnier, Traité des Preuves, §§ 39 & 42.

(*h*) Inst. lib. 2, tit. 20, § 4; Dig. lib. 22, tit. 3, l. 21.

(*i*) Cod. lib. 2, tit. 1, l. 4.

(*k*) Gibert, Corp. Jur. Canon. Prolegom. Pars Post. tit. 7, cap. 2, § 11; No. 7.

(*l*) 4 Inst. 180.

(*m*) Dig. lib. 50, tit. 17, l. 125.

(*n*) Cowp. 343; 8 Wheat. 195.

(*o*) Sext. Decretal. lib. 5, tit. 12; De Regulis Juris, Reg. 11.

(*p*) Heinec. ad Pand. Pars 4, § 144.

(*q*) Dig. lib. 50, tit. 17, l. 9; 1 Ev. Poth. § 711. See however Dig. lib. 50, tit. 17, l. 114.

(*r*) Sext. Decretal. lib. 5, tit. 12; De Reg. Jur. Reg. 31.

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where in an action for goods sold and delivered by a liquor merchant, the only evidence was that several bottles of liquor, of what kind did not appear, were delivered at the defendant's house, Lord Ellenborough directed the jury to presume that they were filled with the cheapest liquor in which the plaintiff dealt (*s*). So where in an action for money lent, it appeared in evidence that, the defendant having asked the plaintiff for some money, the plaintiff delivered to him a bank-note, the amount of which could not be proved, it was held by the Court of Exchequer that the jury were rightly directed, to presume it to have been for the note of lowest amount in circulation (*t*). When however the defendant, or either litigant party, instead of denying what is alleged against him, relies on some new matter which, if true, is an answer to it, the burden of proof changes sides, and he in his turn is bound to shew a primâ facie case at least, and if he leaves it imperfect the court will not assist him: "Agere is videtur, qui exceptione utitur: nam reus in exceptione actor est" (*u*); "In exceptionibus dicendum est, reum partibus actoris fungi oportere" (*v*); "Reus excipiendo fit actor" (*x*); "In genere quicunque aliquid dicit, sive actor sive reus, necesse est ut probet" (*y*). It is in this sense that the maxim, "Semper præsumitur pro negante" (*z*), and the expression that the law presumes against the plaintiff's demand (*a*), are to be understood. And although the burden of proof must, in the first instance, be determined by the issues as they appear on the pleadings, or whatever according to the practice of the court and nature of the case is analogous to plead-

(*s*) *Clunnes* v. *Pezzey*, 1 Camp. 8.

(*t*) *Lawton* v. *Sweeney*, 8 Jur. 964.

(*u*) Dig. lib. 44, tit. 1, l. 1.

(*v*) Dig. lib. 22, tit. 3, l. 19.

(*x*) Bonnier, Traité des Preuves, §§ 152, 320. See also Devotus, Inst. Canon. Lib. 3, tit. 9, § 2.

(*y*) Matthæus de Prob. c. 8, n. 4.

(*z*) 10 Cl. & F. 534.

(*a*) *Clunnes* v. *Pezzey*, 1 Camp. 8.

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ings, it may, and frequently does, shift in the course of a trial. On an indictment for libel, for example, to which the defendant pleads simply not guilty, the burden of proof would lie, in the first instance, on the prosecutor; but on proof that the document, the subject of the indictment, contained matter libellous per se, and was published by the defendant's shewing it to A. B., the law would presume the publication malicious, and cast on the defendant the onus of rebutting that presumption. And if he were to prove in his defence, that it was shewn to A. B. under such circumstances as to render it, primâ facie, a confidential communication, the burden of proof would again change sides, and it would lie on the prosecutor to prove malice in fact.

Test for determining.

§ 268. In order to determine on which of two litigant parties the burden of proof lies, the following test was suggested by Alderson, B., in *Amos* v. *Hughes* (*b*), in 1835, i. e. "*which party would be successful if no evidence at all were given;*" and he not only applied that test in that case, as also in some subsequent cases (*c*), but it has been adopted by other judges at nisi prius (*d*), and frequently recognized by higher tribunals (*e*). As, however, the question of the burden of proof may present itself at any moment during a trial, the test ought in strict accuracy to be expressed, "which party would be successful if no evidence at all, or no more evidence, as the case may be, were given" (*f*). This of course

(*b*) 1 Moo. & R. 464. See also the observations of the same judge in *Huckman* v. *Fernie*, 3 M. & W. 505, and *Mills* v. *Barber*, 1 *Id.* 425.

(*c*) *Belcher* v. *M'Intosh*, 8 C. & P. 720; *Ridgway* v. *Ewbank*, 2 Moo. & R. 217; *Geach* v. *Ingall*, 14 M. & W. 100.

(*d*) *Osborn* v. *Thompson*, 2 Moo. & R. 254; *Doe* d. *Worcester Trustees* v. *Rowlands*, 9 C. & P. 735.

(*e*) *Barry* v. *Butlin*, 2 Moo. P. C. C. 484; *Leete* v. *The Gresham Life Insurance Society*, 15 Jurist, 1161, &c. See the judgment in *Doe* v. *Caldecott* v. *Johnson*, 7 Man. & Gr. 1047.

(*f*) See *Baker* v. *Batt*, 2 Moo. P. C. C. 317, 319.

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depends on the principles regulating the burden of proof; which we now proceed to examine more closely; first observing, however, that in many cases the burden of proof is cast by statute on particular parties (*g*). Principles regulating.

§ 269. 1. The general rule is that the burden of proof lies on the party who asserts the affirmative of the issue, or question in dispute—according to the maxim "Ei incumbit probatio, qui dicit; non qui negat" (*h*); a rule to which the common sense of mankind at once assents; and which, however occasionally violated in practice, has ever been recognized in jurisprudence (*i*). One of the civilians speaks of it as "Regula lippis et tonsoribus nota" (*k*). 1. General rule—lies on the party who asserts the affirmative.

§ 270. Much misconception and embarrassment have been introduced into this subject, by some unfortunate language in which the above principle has been enunciated. "Per rerum naturam," says the text of the Roman law, "factum negantis probatio nulla sit" (*l*); and our old lawyers lay down broadly, "It is a maxim in law that witnesses cannot testify a negative, but an affirmative" (*m*). From these and similar expressions it has been rashly inferred, and is frequently asserted, that "a negative is incapable of proof,"—a position wholly indefensible if understood in an unqualified sense. Reason and the context of the passage in the Code alike Fallacy of the maxim that "a negative is incapable of proof."

(*g*) See a large number collected in Tayl. Ev. §§ 345 *et seq.* 4th Ed.; also 17 & 18 Vict. c. 104, s. 169; 23 & 24 Vict. c. 22, s. 30; 24 & 25 Vict. c. 98, ss. 9, 10, 11, 16, 17, and c. 99, ss. 6, 7, 8; &c.

(*h*) Dig. lib. 22, tit. 3, l. 2; 1 Stark. Ev. 418, 362, 3rd Ed.; 586, 4th Ed.; Phill. & Am. Ev. 827.

(*i*) Voet. ad Pand. lib. 22, tit. 3, N. 10; Vinnius, Jurisp. Contract. lib. 4, c. 24; Domat, Lois Civiles, Part. 1, Liv. 3, tit. 6, sect. 1, §§ 6 & 7; Bonnier, Traité des Preuves, § 29; Co. Litt. 6 b; 2 Inst. 662; Gilb. Ev. 145, 4th Ed.; Stark. Ev. 585—7, 4th Ed. See some other old authorities, *supra*, bk. 1, pt. 2, § 111, n. (*g*).

(*k*) Matthæus de Prob. c. 8, n. 1.

(*l*) Cod. lib. 4, tit. 19, l. 23.

(*m*) Co. Litt. 6 b; 2 Inst. 662. See also 4 Inst. 279, and F. N. B. 107.

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show, that by the phrase "per rerum naturam &c.," nothing more was meant, than to express the undoubted truth, that in the ordinary course of things the burden of proof is not to be cast on the party who merely denies an assertion. The ground on which this rests has been already explained (*n*); and another grave objection to requiring proof of a simple negative is its *indefiniteness*. "Words," says L. C. B. Gilbert (*o*), are but the expressions of facts; and therefore when nothing is said to be done, nothing can be said to be proved." "Negativa nihil implicat" (*p*); "Negativa nihil ponunt" (*q*). A person asserts that a certain event took place, not saying when, where, or under what circumstances; how am I to *disprove* that, and convince others that at no time, at no place, and under no circumstances, has such a thing occurred? "Indefinitum æquipollet universali" (*r*). The utmost that could possibly be done in most instances would be, to shew the improbability of the supposed event; and even this would usually require an enormous mass of presumptive evidence. "Coment que les testm̃," it is said in a very old case in our books (*s*), "disont par certein discretion c̃ fait nemy estre vray, uncore il est possible que le fait est vray, et les tesm̃ scient rien de ceo; car ils ne fuĩ pas al' temps de confecc̃ psent, &c." Hence the well known rule that affirmative evidence is in general better than negative evidence (*t*). But when the negative ceases to be a *simple* one—when it is qualified by time, place, or circumstance,—much of this objection is removed; and proof of a negative may very reasonably be required, when the qualifying circumstances are the direct matter

(*n*) *Suprà*, § 268.

(*o*) Gilb. Ev. 145, 4th Ed.

(*p*) 30 Ass. pl. 5; Long. Quint. 22 A.

(*q*) 18 Edw. III. 44 B. pl. 50.

(*r*) 1 Vent. 368. See also Branch, Max. "Propositio indefinita &c."

(*s*) 23 Ass. p. 11, per Thorpe, C. J.

(*t*) 8 Mod. 81; 2 Curt. Eccl. Rep. 434; Wills, Circ. Ev. 224, 3rd Ed.; Stark. Ev. 867, 4th Ed.

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in issue, or the affirmative is either probable in itself or supported by a presumption, or peculiar means of proof are in the hands of the party asserting the negative (*u*).

Difference between negative averments and negatives.

§ 271. But here, two things must be particularly attended to: First, not to confound negative averments, or allegations in the negative, with traverses of affirmative allegations (*v*); and, secondly, to remember that the affirmative and negative of the issue mean the affirmative and negative of the issue in *substance*, and not merely its affirmative and negative in *form* (*w*). With respect to the former: if a party asserts affirmatively, and it thereby becomes necessary to his case to prove that a certain state of facts does *not* exist, or that a particular thing is insufficient for a particular purpose, and such like; these, although they resemble negatives, are not

(*u*) "Affirmativa melius probatur, quam negativa, cùm negativa probari non possit. Hinc oritur regula illa vulgaris, duobus testibus affirmantibus magis credi, quam mille negantibus. * * * *Natt.* dicit eam esse rationem; eo quia deponens super affirmativa potest reddere causam magis probabilem, quia negativa non ita se offert sensui sicut affirmativa secundum Bal. &c. * * * Primò limita hoc esse verum in negativa non coarctata loco, et tempore, quia illa non cadit sub sensum testis: * * * si vero est munita loco, et tempore ita ut cadat sub sensum testis, et ex sui naturâ probari possit, ut si testis dicat illo die, et loco cum judex ille sententiam tulisset inter Seium, et Mevium, pecunia, non domo Mevium mulctavit, ibi enim interfui et mulctam domûs irrogatam vidi: tunc par est virtus testis deponentis affirmativam, sicut negativam, et non magis creditur affirmantibus, quàm negantibus, &c." Mascard. de Prob. Concl. 70. "Probat qui asserit, non qui negat, eo quod per rerum naturam factum negantis probatio nulla est; si modo negatio facti, et negatio simplex sit, nullis circumstantiis loci aut temporis munita: nam si vel juris negatio fiat, vel facti negatio qualitatibus loci atque temporis vestita sit, ipsi neganti probatio per leges imposita est; cum hujusmodi inficiationes in se involvant affirmationem quandam." Voet. ad Pand. lib. 22, tit. 3, n. 10. See also Vinnius, Jurisp. Contract. lib. 4, c. 24, and Kelemen, Inst. Jur. Hungar. Privat. lib. 3, § 97.

(*v*) *Berty* v. *Dormer*, 12 Mod. 526; *Harvey* v. *Towers*, 15 Jurist, 544, 545, per Alderson, B.

(*w*) See *infrà*, § 272.

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negatives in reality—they are, in truth, positive averments, and the party who makes them is bound to prove them. Thus, in an issue out of Chancery, directed to inquire whether certain land assigned for the payment of a legacy was deficient in value, where issue was joined upon the deficiency, the one party alleging that it was deficient, and the other that it was not; it was held by the court, (Holt, C. J., presiding,) that though the averring that it was deficient is such an affirmative as implies a negative, yet it is such an affirmative as turns the proof on those that plead it; if he had joined the issue that the land was not of value, and the other had averred that it was, the proof then had lain on the other side (*x*). So, in an action of covenant against a lessee, where the breach is, in the language of the covenant, that the defendant did not leave the premises in repair at the end of the term, the proof of the breach lies on the plaintiff (*y*).

Determined by the affirmative in *substance*, not the affirmative in *form*.

§ 272. Again, as already mentioned, the incumbency of proof is determined by the affirmative in *substance*, not the affirmative in *form* (*z*). "Quis sit affirmans, vel negans non tam ex verborum figurâ, quam eorum sententiâ reique naturâ colligitur" (*a*). "Si issint soit come vous dits, uncore nostre affirmative comprend en luy meme ũ negative: car, &c.; issint *affirmativa præsupponit negativam.* Et en moults cases 2 affirmatives, ou un comprend un negative, feĩ bon issue:" per Rolf, arguendo, H. 8 H. VI. 22 B. "Affirmativum negativum

(*x*) *Berty* v. *Dermer*, 12 Mod. 526.

(*y*) Ph. & Am. Ev. 828; *Harvey* v. *Towers*, 15 Jurist, 544, 545, per Platt, B. See also *Croft* v. *Lumley*, 6 H. L. C. 672.

(*z*) *Ames* v. *Hughes*, 1 Moo. & R. 464; *Ridgway* v. *Ewbank*, 2 Moo. & R. 217; *Smith* v. *Davies*, 7 C. & P. 307; *Soward* v. *Leggatt*, *Id.* 613; *Jefferies* v. *Clare*, 2 M. & W. 43, 46, per Alderson, B.

(*a*) Huberus, Positiones Juris, sec. Pand. lib. 22, tit. 3, N. 10. See ad id. Struvius, Syntag. Jur. Civ. Exercit. 28, § VI. and Vinnius, Jurisp. Contract. lib. 4, cap. 24.

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implicat" (*b*). The following cases will illustrate this. In *Amos* v. *Hughes* (*c*), which was an action of assumpsit on a contract to emboss calico in a workmanlike manner; the breach was, that the defendant did not emboss the calico in a workmanlike manner, but, on the contrary, embossed it in a bad and unworkmanlike manner; to which the defendant pleaded that he did emboss the calico in a workmanlike manner; on which issue was joined; Alderson, B. said, that questions of that kind were not to be decided by simply ascertaining on which side the affirmative in point of form lay; that supposing no evidence was given on either side, the defendant would be entitled to the verdict, for it was not to be assumed that the work was badly executed; and consequently that the onus probandi lay on the plaintiff. In *Soward* v. *Leggatt* (*d*), which was an action of covenant on a demise, whereby the defendant covenanted to repair a messuage, &c., and to paint the outside woodwork once in every three years, and the inside woodwork within the last six years of the termination of the lease; the plaintiff alleged as breaches, that the defendant did not repair the messuage, &c., and did not paint the outside woodwork once in every three years, and did not paint the inside woodwork within the last six years of the term, but, on the contrary thereof, &c.: and the defendant pleaded that he did, from time to time, at his own proper costs, &c., well and sufficiently repair the messuage, &c.; and that he did paint the outside woodwork once in every three years during the term (specifying the times); and the whole of the inside parts that were usually painted, within the last six years of the termination of the term, to wit, &c.; nor were the same ruinous, prostrate, &c., and in a bad state of order and condition for want of needful and necessary reparations, &c.; nor were the same at the end of the term

(*b*) Branch, Maxims.
(*c*) 1 Moo. & R. 464.
(*d*) 7 C. & P. 613.

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left by the defendant so ruinous, prostrate, &c.; concluding to the country. On these pleadings each party claimed the right to begin,—contending that the burden of proof lay on him; and Lord Abinger, C. B., said, "Looking at these things according to common sense, we should consider what is the substantive fact to be made out, and on whom it lies to make it out. It is not so much the form of the issue which ought to be considered, as the substance and effect of it. In many cases a party, by a little difference in the drawing of his pleadings, might make it either affirmative or negative, as he pleased. I shall endeavour, by my own view, to arrive at the substance of the issue." And he held that the plaintiff had the right to begin, as the burden of proof lay on him.

2. Shifted by presumptions and primâ facie evidence.

§ 273. 2. The burden of proof is shifted by those presumptions of law which are rebuttable; by presumptions of fact of the stronger kind; and by every species of evidence strong enough to establish a primâ facie case against a party. When a presumption is in favour of the party who asserts the negative, it only affords an additional reason for casting the burden of proof on his adversary; it is when a presumption is in favour of the party who asserts the affirmative that its effect becomes visible, as the opposite side is then bound to prove his negative. The subject of presumptions in general will be treated in the Second Part of the present Book (*e*).

3. Lies on the party who has peculiar means of knowledge.

§ 274. 3. There is a third circumstance which may affect the burden of proof, namely, the capacity of parties to give evidence. "The law," says one of our old books (*f*), "will not force a man to show a thing which by intendment of law lies not within his knowledge."

(*e*) *Infrà*, Part 2, Chap. 2.

(*f*) Plowd. 46. See ad id. Plowd. 54—5, 123, 128, 129; Finch, Law, 48; 9 Co. 110; and T. 13 Edw. II. 407, tit. Covenant.

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"Lex neminem cogit ostendere quod nescire præsumitur" (*g*). From the very nature of the question in dispute all, or nearly all, the evidence that could be adduced respecting it must be in the possession of, or easily attainable by, one of the contending parties, who accordingly could at once put an end to litigation by producing that evidence; while the requiring his adversary to establish his case because the affirmative lay on him, or because there was a presumption of law against him, would, if not amounting to injustice, at least be productive of expense and delay. In order to prevent this, it has been established as a general rule of evidence, that the burden of proof lies on the person who wishes to support his case, by a particular fact which lies more peculiarly within his own knowledge, or of which he is supposed to be cognizant (*h*). Thus where, in an action by the assignees of a bankrupt for a debt due to the bankrupt's estate, the defendant offered to set off some cash notes issued by the bankrupt, payable to bearer, and bearing date before his bankruptcy; it was held that the defendant was bound to show that they came into his hands before the bankruptcy (*i*).

§ 275. This rule is of very general application: it holds good whether the proof of the issue involves the proof of an affirmative or of a negative, and has even been allowed to prevail against presumptions of law. But the authorities are by no means agreed as to the *extent* to which it ought to be carried. In *R.* v. *Turner* (*j*), Bayley, J., says, "I have always understood it to be a general rule, that if a negative averment be made by one party, which is peculiarly within the knowledge

Discrepancy in the authorities as to the *extent* of this rule.

(*g*) Lofft. M. 569.

(*h*) Ph. & Am. Ev. 829; *R.* v. *Burdett*, 4 B. & A. 95, 140, per Holroyd, J.; *Dickson* v. *Evans*, 6 T. R. 57, 60, per Ashhurst, J.; *Calder* v. *Rutherford*, 3 B. & B. 302; *Sunderland Marine Insurance Company* v. *Kearney*, 16 Q. B. 925.

(*i*) *Dickson* v. *Evans*, 6 T. R. 57.

(*j*) 5 Man. & S. 206, 211.

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of the other, the party within whose knowledge it lies, and who asserts the affirmative, is to prove it, and not he who avers the negative." But in *Elkin* v. *Janson* (*k*), Alderson, B., on this dictum being quoted, said, "I doubt, as a general rule, whether those expressions are not too strong. They are right as to the *weight* of the evidence, but there should be some evidence to start it, in order to cast the onus on the other side." And in *R.* v. *Burdett* (*l*), Holroyd, J., states in the most explicit terms that the rule in question "is not allowed to supply the want of necessary proof, whether direct or presumptive, against a defendant, of the crime with which he is charged; but when such proof has been given, it is a rule to be applied in considering the weight of the evidence against him, whether direct or presumptive, when it is unopposed, unrebutted, or not weakened by contrary evidence, which it would be in the defendant's power to produce, if the fact directly or presumptively proved were not true."

§ 276. If this be the true principle, as it probably is, there are some cases in the books which seem to go much beyond it. At the head of these stand various decisions on the game laws (*m*), and especially *R.* v. *Turner* (*n*),—which was a conviction by two justices under the stat. 5 Ann. c. 14, sect. 2, against a carrier for having game in his possession;—and where the Court of Queen's Bench held it sufficient, if the qualifications in the 22 & 23 Car. 2, c. 25, sect. 3 were negatived in the information and adjudication, although they were not negatived by the evidence. This decision was based altogether on the rule under consideration, and the argument ab inconvenienti that the defendant must know the nature of his qualifi-

(*k*) 13 M. & W. 655, 662.
(*l*) 4 B. & A. 95, 140.
(*m*) Several of them are referred to in *R.* v. *Turner*, 5 Man. & S. 206.
(*n*) 5 Man. & S. 206.

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cation if he had one: whereas the prosecutor would be obliged, if the burden of proof were cast upon him, to negative ten or twelve different heads of qualification enumerated in the statute; which the court pronounced to be next to impossible. The 5 Anne, c. 14, has been repealed by the 1 & 2 Will. 4, c. 32: by the 42nd section of which, however, it is *declared* and enacted, that it shall not be necessary in any proceeding against any person under that act to negative by evidence any certificate, licence, consent, authority or other matter of exception or defence; but that the party seeking to avail himself of any such certificate, licence, &c., or other matter of exception or defence, shall be bound to prove the same. In the subsequent case of *Doe* d. *Bridger* v. *Whitehead* (*o*), which was an ejectment by a landlord against a tenant, on an alleged forfeiture by breach of a covenant in his lease, to insure against fire in some office in or near London, it was contended that it lay on the defendant to shew that he had insured, that being a fact within his peculiar knowledge; the old argument ab inconvenienti was strongly urged, that the plaintiff could not bring persons from every insurance office in or near London to shew that no such insurance had been effected by the defendant; and *R.* v. *Turner* and some other cases of that class were cited. But the court refused to accede to this view. Lord Denman, C. J., in delivering judgment, said, "I do not dispute the cases on the game laws which have been cited; but there the defendant is, in the first instance, shewn to have done an act which was unlawful unless he was qualified; and then the proof of qualification is thrown upon the defendant. Here the plaintiff relies on something done or permitted by the lessee, and takes upon himself the burden of proving that fact. The proof may be difficult where the matter is peculiarly within the de-

(*o*) 8 A. & E. 571

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fendant's knowledge; but that does not vary the rule of law. And the landlord might have had a covenant inserted in the lease, to insure at a particular office, or to produce a policy when called for, on pain of forfeiture. If he will make the conditions of his lease such as to render the proof of a breach very difficult, the court cannot assist him." This ruling seems upheld by subsequent cases (*p*).

§ 277. It remains to add, that the difficulties attending the application of this principle to criminal charges have been felt in America as well as here, as appears from the following passage in Greenl. Evid. vol. 3, § 24, note (2), 2nd Ed.

"The question as to the burden of proving the negative averment of disqualification in the defendant, arising from his *want of licence* to do the act complained of, was fully considered in *The Commonwealth* v. *Thurlow*, 24 Pick. 374, which was an indictment for selling spirituous liquors without licence. The Chief Justice [Shaw] delivered the judgment of the court upon this point in the following terms:—

"'The last exception necessary to be considered is, that the court ruled that the prosecutor need give no evidence in support of the negative averment, that the defendant was not duly licensed, thereby throwing on him the burden of proving that he was licensed, if he intends to rely on that fact by way of defence. The court entertain no doubt that it is necessary to aver in the indictment, as a substantive part of the charge, that the defendant, at the time of selling, was not duly licensed. How far, and whether under various circumstances, it is necessary to prove such negative averment, is a question of great difficulty, upon which there are conflicting authorities. Cases may be suggested of

(*p*) *Wedgwood* v. *Hart*, 2 Jurist, N. S. 288; *Price* v. *Worwood*, 4 H. & N. 512.

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great difficulty on either side of the general question. Suppose under the English game laws, an unqualified person prosecuted for shooting game without the licence of the lord of the manor, and after the alleged offence and before the trial, the lord dies, and no proof of licence, which may have been by parol, can be given? Shall he be convicted for want of such affirmative proof, or shall the prosecution fail for want of proof to negative it? Again, suppose under the law of this Commonwealth it were made penal for any person to sell goods as a hawker and pedlar, without a licence from the selectmen of some town in the Commonwealth. Suppose one prosecuted for the penalty, and the indictment, as here, contains the negative averment, that he was not duly licensed. To support this negative averment, the selectmen of more than three hundred towns must be called. It may be said, that the difficulty of obtaining proof is not to supersede the necessity of it, and enable a party having the burden, to succeed without proof. This is true; but when the proceeding is upon statute, an extreme difficulty of obtaining proof on one side, amounting nearly to impracticability, and great facility of furnishing it on the other, if it exists, leads to a strong inference, that such course was not intended by the legislature to be required. It would no doubt be competent for the legislature so to frame a statute provision, as to hold a party liable to the penalty, who should not produce a licence. Besides, the common-law rules of evidence are founded upon good sense and experience, and adapted to practical use, and ought to be so applied as to accomplish the purposes for which they were framed. But the court have not thought it necessary to decide the general question; cases may be affected by special circumstances, giving rise to distinctions applicable to them to be considered as they arise. In the present case, the court are of opinion that the prosecutor was bound to produce *primâ facie* evidence, that the de-

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fendant was not licensed, and that no evidence of that averment having been given, the verdict ought to be set aside. The general rule is, that all the averments necessary to constitute the substantive offence, must be proved. If there is any exception, it is from necessity, or that great difficulty, amounting, practically, to such necessity; or in other words, where one party could not shew the negative, and where the other could with perfect ease shew the affirmative. But if a party is licensed as a retailer under the statutes of the Commonwealth, it must have been done by the county commissioners for the county where the cause is tried, and within one year next previous to the alleged offence. The county commissioners have a clerk and are required by law to keep a record, or memorandum in writing, of their acts, including the granting of licences. This proof is equally accessible to both parties, the negative averment can be proved with great facility, and therefore, in conformity to the general rule, the prosecutor ought to produce it, before he is entitled to ask a jury to convict the party accused.' 24 Pick. 380, 381. This point has since been settled otherwise, in *Massachusetts*, by stat. 1844, ch. 102, which devolves on the defendant the burden of proving the licence. So it is held at common law, in *North Carolina; The State* v. *Morrison*, 3 Dev. 299. And in *Kentucky; Haskill* v. *The Commonwealth*, 3 B. Monr. 342. And in *Maine; The State* v. *Crowell*, 12 Shepl. 171. And in *Indiana; Shearer* v. *The State*, 7 Blackf. 99." See, also, on this subject, *The Commonwealth* v. *Kimball*, 24 Pick. 366.

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Chapter III.

HOW MUCH MUST BE PROVED.

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§ 278. The just and reasonable principle, that tribunals should look to the meaning rather than to the language of the pleadings, or other statements of litigant parties, is not confined to the burden of proof, but extends to the proof itself. The rule of law from the

Rule—Sufficient if the issues, &c. raised are proved *in substance.*

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earliest times has been, that it is sufficient if the issues, &c. raised are proved *in substance* (*a*). This is in truth only a branch of a still more general principle which runs through every rational system of jurisprudence.—"Lex rejicit superflua" (*b*), "Superflua non nocent" (*c*), "Utile per inutile non vitiatur" (*d*).

Averments and statements wholly immaterial may be disregarded.

§ 279. The most obvious application of this rule is in the case of averments and statements wholly immaterial. All averments which might be expunged from the record without affecting the validity of the pleading in which they appear, may be disregarded at the trial; for such averments only encumber the record, and the proof of them would be as irrelevant as themselves (*e*). And there can be no doubt that the same principle applies to allegations and statements made otherwise than in formal pleadings. All this, however, must be understood of pleadings which shew a good ground of action or defence in law; for it is a rule that a bad pleading must be proved in omnibus to entitle the party pleading it to a verdict (*f*).

But not when they affect what is material.

§ 280. But matter which need not have been stated may be injurious, or even fatal, when it affects that which is material. A party may allege or prove things

(*a*) Litt. ss. 483, 484, 485; Co. Litt. 227 a, 281 b, 282 a; Hob. 73, 81; 2 Rol. 41—2; Tryals per Pais, 140, Ed. 1665; 1 Phill. Ev. 558, 10th Ed.; 1 Stark. Ev. 431, 3rd Ed.; *Id.* 625, 4th ed. For earlier authorities see bk. 1, pt. 2, § 111, note (*g*).

(*b*) Jenk. Cent. 3, cas. 72.

(*c*) Jenk. Cent. 4, cas. 74; Cent. 8, cas. 41.

(*d*) Co. Litt. 3 a, 227 a, 379 a; 3 Co. 10 a; 10 Co. 110 a; Hob. 171; 2 Saund. 369; 1 Stark. Ev. 432, 3rd Ed.; *Id.* 625, 4th Ed. "Non solent, quæ abundant, vitiare scripturas:" Dig. lib. 50, tit. 17, l. 94. "Utile non debet per inutile vitiari:" Sext. Decretal. lib. 5, tit. 12, De Reg. Jnr. Reg. 37.

(*e*) 1 Phill. Ev. 558, 567, 568, 10th Ed.; 1 Stark. Ev. 432, 3rd Ed.; *Id.* 626, 4th Ed.

(*f*) *Walker* v. *Goe*, 3 H. & N. 405; *Mardall* v. *Thelluson*, 6 E. & B. 980, per Cresswell, J.

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which he was not bound to allege or prove, but which, when alleged or proved, put his case out of court (*g*). Thus where, before the 15 & 16 Vict. c. 76, s. 64, a party in giving express colour stated a *true* title in his adversary instead of a defective one, the latter was entitled to judgment on the pleader's own shewing (*h*). It is accordingly a rule that averments, though unnecessarily introduced, cannot be rejected when they operate by way of description or limitation of essentials (*i*). "Let an averment of this kind," says an eminent authority on evidence (*j*), "be ever so superfluous in its own nature, it can never be considered to be immaterial when it constitutes the identity of that which is material."

The tribunal should ascertain the real question between the parties.

§ 281. This rule does not merely absolve from proof of irrelevant matter. It has a far more general application; and means that the tribunal by which a cause is tried should examine the record or allegations of the contending parties, or of their advocates, as the case may be, with a legal eye, in order to ascertain the real question raised between them. In illustration we shall first cite some old authorities, both because they are very apposite, and also to shew that the rule under consideration is not an arbitrary invention of modern times, —a light in which it is too common to view all the rules of evidence.

Illustrations from old authorities.

§ 282. "If," says Littleton (*k*), "a man bring a writ of entry in casu proviso, of the alienation made by the tenant in dower to his disinheritance, and counteth of

(*g*) 1 Edw. V., 3, pl. 5; Keilw. 165 b, pl. 2; Plowd. 32, 84; Finch, Law, 65; and *Lush* v. *Russell*, 5 Exch. 203.

(*h*) Steph. Plead. 245, 5th ed.

(*i*) 1 Stark. Ev. 443, 3rd Ed.; Ph. & Am. Ev. 853; 1 Phill. Ev. 567, 10th Ed.; *Webb* v. *Ross*, 5 Jurist, N. S. 126, 127, per Martin, B.

(*j*) 1 Stark. Ev. 443, 3rd Ed.

(*k*) Litt. sect. 483.

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the alienation made in fee, and the tenant saith, that he did not alien in manner as the demandant hath declared, and upon this they are at issue, and it is found by verdict that the tenant aliened in tail, or for term of another man's life, the demandant shall recover: yet the alienation was not in manner as the demandant hath declared." "Also (*l*), if there be lord and tenant, and the tenant hold of the lord by fealty only, and the lord distrain the tenant for rent, and the tenant bringeth a writ of trespass against his lord for his cattle so taken, and the lord plead that the tenant holds of him by fealty and certain rent, and for the rent behind he came to distrain, &c. and demand judgment of the writ brought against him, quare vi et armis, &c., and the other saith that he doth not hold of him in the manner as he suppose, and upon this they are at issue, and it is found by verdict that he holdeth of him by fealty only; in this case the writ shall abate, and yet he doth not hold of him in the manner as the lord hath said. For the matter of the issue is, whether the tenant holdeth of him or no; for if he holdeth of him, although that the lord distrain the tenant for other services which he ought not to have, yet such a writ of trespass quare vi et armis, &c. doth not lie against the lord, but shall abate." "Also (*m*), in a writ of trespass for battery, or for goods carried away, if the defendant plead not guilty, in manner as the plaintiff suppose, and it is found that the defendant is guilty in another town, or at another day than the plaintiff supposes, yet he shall recover. And so in many other cases these words, viz. in manner as the demandant or the plaintiff hath supposed, do not make any matter of substance of the issue; &c." In illustration of this the two following cases, supported by the authority of an early Year Book, are given by Sir Edward Coke. "In assise of darreine

(*l*) Litt. sect. 484. (*m*) *Id.* sect. 485.

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presentment, if the plaintiff allege the avoidance of the church by privation, and the jury find the voydance by death, the plaintiff shall have judgment: for the manner of voydance is not the title of the plaintiff, but the voydance is the matter (*n*). If a guardian of an hospital bring an assise against the ordinary, he pleadeth that in his visitation he deprived him as ordinary, whereupon issue is taken, and it is found that he deprived him as patron; the ordinary shall have judgment, for the deprivation is the substance of the matter" (*o*).

Other instances.

§ 283. The books contain many other instances of the effect of this rule (*p*). Thus, in an action on a bond, a plea of *solvit ad diem* is supported by proof of payment *ante diem* (*q*), for the payment so as to save the penalty is the matter in issue. In an action against a tenant for waste in cutting down a certain number of trees, proof that the defendant cut down a less number maintains the issue (*r*). Although in actions on contracts the contract must be correctly stated, and proved as laid; yet every day's practice shows that in actions on simple contract, as also in actions of tort, the plaintiff may recover for a less sum than that claimed in the declaration. And in actions of tort, generally, it is sufficient to prove a substantial portion of the trespasses or grievances complained of, &c.

Application of the rule in criminal cases.

At common law.

§ 284. The rule in question is not confined to civil cases (*s*). It is a principle running through the whole criminal law, that it is sufficient to prove so much of an indictment as charges the accused with a substantive

(*n*) Co. Litt. 282 a; 6 Edw. III. 41 b, pl. 22.

(*o*) Co. Litt. 282 a; 8 Edw. III. 70, pl. 37; 8 Ass. pl. 29.

(*p*) For other instances to be found in the old books, see 2 Rol. Abr. 681, Evidence (D).

(*q*) Ph. & Am. Ev. 846; 1 Phill. Ev. 559, 10th Ed.

(*r*) Co. Litt. 282 a; Ph. & Am. Ev. 847.

(*s*) Co. Litt. 282 a; Ph. & Am. Ev. 849; 1 Phill. Ev. 562, 10th Ed.

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crime (*t*). And what averments in an indictment are so separable and divisible from the rest, that want of proof of those averments shall not vitiate the whole, forms an important head of practice. For instance: on an indictment for burglary and stealing goods in the house, the averments of breaking and stealing are divisible, so that if the burglary be not proved the accused may be convicted of larceny (*u*); as he also may on a charge of robbery, where it appears that the taking was not with violence (*x*). And on an indictment for murder the accused may be (and often is) convicted of manslaughter; for the substance of the offence charged is the felonious slaying,—malice aforethought being only an aggravation (*y*). By several modern statutes, also, a like principle has been extended to various offences not actually charged in an indictment. Thus, by the 24 & 25 Vict. c. 100, s. 60, a person indicted for child murder, may, though acquitted of the murder, be convicted of the misdemeanor of concealing the birth of the child. By the 7 Will. 4 & 1 Vict. c. 85, s. 11, it was enacted, that on the trial of any person for certain offences mentioned in that statute, or for any felony whatever, where the crime charged should include an assault against the person, it should be lawful for the jury to acquit of the felony and find a verdict of guilty of assault, &c. This statute has been repealed by 14 & 15 Vict. c. 100, which contains several very important provisions on this subject.

By statute.

24 & 25 Vict. c. 100, s. 60.

7 Will. 4 & 1 Vict. c. 85, s. 11 (repealed).

14 & 15 Vict. c. 100.

Sect. 9.

Section 9. "If on the trial of any person charged with any felony or misdemeanor, it shall appear to the jury upon the evidence that the defendant did not complete the offence charged, but that he was guilty only of an attempt to commit the same, such person shall

(*t*) 1 Phill. Ev. 562, 10th Ed.; *R.* v. *Hunt*, 2 Camp. 583.
(*u*) 1 Hale, P. C. 559.
(*x*) *Id.* 534, 535, *Harman's case.*
(*y*) Bro. Ab. Corone, pl. 221; Co. Litt. 282 a; Gilb. Evid. 269, 4th Ed.

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not by reason thereof be entitled to be acquitted, but the jury shall be at liberty to return as their verdict that the defendant is not guilty of the felony or misdemeanor charged, but is guilty of an attempt to commit the same, and thereupon such person shall be liable to be punished in the same manner, as if he had been convicted upon an indictment for attempting to commit the particular felony or misdemeanor charged in the said indictment; and no person so tried as herein lastly mentioned, shall be liable to be afterwards prosecuted for an attempt to commit the felony or misdemeanor for which he was so tried."

Sect. 11, repealed and re-enacted by 24 & 25 Vict.

Section 11, repealed by 24 & 25 Vict. c. 95, and re-enacted by the 24 & 25 Vict. c. 96, s. 41. "If upon the trial of any person upon any indictment for robbery, it shall appear to the jury upon the evidence that the defendant did not commit the crime of robbery, but that he did commit an assault with intent to rob, the defendant shall not by reason thereof be entitled to be acquitted, but the jury shall be at liberty to return as their verdict, that the defendant is guilty of an assault with intent to rob, and thereupon such defendant shall be liable to be punished in the same manner as if he had been convicted upon an indictment for feloniously assaulting with intent to rob; and no person so tried as is herein lastly mentioned, shall be liable to be afterwards prosecuted for an assault with intent to commit the robbery for which he was so tried."

Sect. 12.

Section 12. "If upon the trial of any person for any misdemeanor it shall appear that the facts given in evidence amount in law to a felony, such person shall not by reason thereof be entitled to be acquitted of such misdemeanor; and no person tried for such misdemeanor shall be liable to be afterwards prosecuted for felony on the same facts, unless the court before which such trial may be had shall think fit, in its discretion, to discharge the jury from giving any verdict upon

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such trial, and to direct such person to be indicted for felony, in which case such person may be dealt with in all respects as if he had not been put upon his trial for such misdemeanor."

Sect. 13, repealed and re-enacted by 24 & 25 Vict.

Section 13, repealed by 24 & 25 Vict. c. 95, and re-enacted with amendments by 24 & 25 Vict. c. 96, s. 72. "If upon the trial of any person indicted for embezzlement, or fraudulent application or disposition, &c., it shall be proved that he took the property in question in any such manner as to amount in law to larceny, he shall not by reason thereof be entitled to be acquitted, but the jury shall be at liberty to return as their verdict that such person is not guilty of embezzlement, or fraudulent application or disposition, but is guilty of simple larceny, or of larceny as a clerk, servant, or person employed for the purpose or in the capacity of a clerk or servant, or as a person employed in the public service, or in the police, as the case may be; and thereupon such person shall be liable to be punished in the same manner as if he had been convicted upon an indictment for such larceny; and if upon the trial of any person indicted for larceny it shall be proved that he took the property in question in any such manner as to amount in law to embezzlement, or fraudulent application or disposition as aforesaid, he shall not by reason thereof be entitled to be acquitted, but the jury shall be at liberty to return as their verdict that such person is not guilty of larceny, but is guilty of embezzlement, or fraudulent application or disposition, as the case may be, and thereupon such person shall be liable to be punished in the same manner as if he had been convicted upon an indictment for such embezzlement, fraudulent application or disposition; and no person so tried for embezzlement, fraudulent application or disposition, or larceny as aforesaid, shall be liable to be afterwards prosecuted for larceny, fraudulent application or disposition, or embezzlement, upon the same facts."

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Section 14, repealed by 24 & 25 Vict. c. 95, and re-enacted with amendments by 24 & 25 Vict. c. 96, s. 94. "If upon the trial of any two or more persons indicted for jointly receiving any property, it shall be proved that one or more of such persons separately received any part or parts of such property, it shall be lawful for the jury to convict, upon such indictment, such of the said persons as shall be proved to have received any part or parts of such property." Sect. 14, repealed and re-enacted by 24 & 25 Vict.

§ 285. But although the law is thus liberal in looking through mere form in order to see the real substance of the questions raised, a positive *variance* or discrepancy between a pleading and the proof adduced in support of it was always fatal—a rule absolutely necessary to prevent the opposite party from being unfairly taken by surprise, and the whole system of pleading converted into a snare. Still this principle, however salutary in itself, was certainly carried too far; and indeed it would be strange if the supersubtile spirit which in the fourteenth and fifteenth centuries took possession of our pleadings, had not extended its influence to their proof(*z*). The consequence was that the best causes were continually lost through variances of the most unimportant kind: in order to obviate the danger of which, practitioners resorted to the plan of stating the same cause of complaint in different counts; and, whenever they could obtain leave of the court under the statute 4 Ann. c. 16, stating the same subject-matter of defence in different pleas, varied only in circumstances. For replications and subsequent pleadings there was no help whatever(*a*); and the devices just mentioned, while they added very considerably to the intricacy of Variance.

(*z*) See Co. Litt. 303 a, 304 a and b.

(*a*) By 15 & 16 Vict. c. 76, s. 81, several matters may now, by leave of the court or a judge, be pleaded at any stage of the pleadings.

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Amendment of variances. 9 Geo. 4, c. 15.

pleadings and expense of suits, had not always the desired effect. The attention of the legislature was at length turned to the subject. The 9 Geo. 4, c. 15, empowers every court of record holding plea in civil actions, any judge sitting at nisi prius, and any court of oyer and terminer and general goal delivery, if such court or judge shall see fit so to do, to cause the record on which any trial may be pending before any such judge or court in any civil action, or in any indictment or information for any misdemeanor, when any variance shall appear between any matter in writing or in print produced in evidence, and the recital or setting forth thereof upon the record whereon the trial is pending, to be forthwith amended in such particular by some officer of the court, on payment of such costs (if any) to the other party as such judge or court shall think reasonable; and enacts that thereupon the trial shall proceed as if no such variance had appeared.

In civil cases.

§ 286. This statute, it is obvious, went a very short way towards remedying the evil. It was, however, afterwards met more vigorously in civil cases by the (Pleading) Rules of H. T. 4 Will. 4, to which was given the force of an act of parliament, and by the statute 3 & 4 Will. 4, c. 42. The 5th of those Rules, after reciting that "by the mode of pleading hereinafter prescribed, the several disputed facts material to the merits of the case will, before the trial, be brought to the notice of the respective parties more distinctly than heretofore; and by the act of 3 & 4 Will. 4, c. 42, s. 23," (passed a few months before), "the powers of amendment at the trial, in cases of variance in particulars not material to the merits of the case, are greatly enlarged," orders that "several counts shall not be allowed, unless a distinct subject-matter of complaint is intended to be established in respect of each; nor shall several pleas, or avowries, or cognizances be allowed, unless a

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distinct ground of answer or defence is intended to be established in respect of each, &c." The Pleading Rules of H. T. 16 Vict., which also have the force of an act of parliament (*b*), (RR. 1 and 2,) prohibit several counts on the same cause of action, and several pleas, replications, or subsequent pleadings, or several avowries or cognizances, founded on the same ground of answer or defence; reserving power, however, to the court or a judge to allow such, if proper for determining the real question in controversy between the parties on its merits, &c.

§ 287. The statute 3 & 4 Will. 4, c. 42, s. 23, referred to in the above rule, enacts, "that it shall be lawful for any court of record, holding plea in civil actions, and any judge sitting at nisi prius, if such court or judge shall see fit so to do, to cause the record, writ, or document on which any trial may be pending before any such court or judge, in any civil action, or in any information in the nature of a quo warranto, or proceedings on a mandamus, when any variance shall appear between the proof and the recital or setting forth, on the record, writ, or document on which the trial is proceeding, of any contract, custom, prescription, name, or other matter, in any particular or particulars in the judgment of such court or judge not material to the merits of the case, and by which the opposite party cannot have been prejudiced in the conduct of his action, prosecution, or defence, to be forthwith amended by some officer of the court or otherwise, &c., on such terms as to payment of costs to the other party, or postponing the trial to be had before the same or another jury, or both payment of costs and postponement, as such court or judge shall think reasonable; and in case such variance shall be in some particular or particulars in the judgment of such

Statutes.
3 & 4 Will. 4, c. 42, s. 23.

(*b*) 13 & 14 Vict. c. 16; 15 & 16 Vict. c. 76, s. 223.

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court or judge not material to the merits of the case, but such as that the opposite party may have been prejudiced thereby in the conduct of his action, prosecution, or defence, then such court or judge shall have power to cause the same to be amended upon payment of costs to the other party, and withdrawing the record or postponing the trial as aforesaid, as such court or judge shall think reasonable; and after any such amendment the trial shall proceed, in case the same shall be proceeded with, in the same manner in all respects, &c., as if no such variance had appeared, &c.: provided that it shall be lawful for any party who is dissatisfied with the decision of such judge at nisi prius, sheriff or other officer, respecting his allowance of any such amendment, to apply to the court from which such record or writ issued, for a new trial upon that ground; and in case any such court shall think such amendment improper, a new trial shall be granted accordingly, on such terms as the court shall think fit, or the court shall make such other order as to them may seem meet." And by the 24th section "the said court or judge shall and may, if they or he think fit, in all such cases of variance, instead of causing the record or document to be amended as aforesaid, direct the jury to find the fact or facts according to the evidence, and thereupon such finding shall be stated on such record or document, and, notwithstanding the finding on the issue joined, the said court or the court from which the record has issued shall, if they shall think the said variance immaterial to the merits of the case, and the misstatement such as could not have prejudiced the opposite party in the conduct of the action or defence, give judgment according to the very right and justice of the case."

Sect. 24.

The Common Law Procedure Acts.

15 & 16 Vict. c. 76.

§ 288. The power of amendment in civil cases generally has been much increased by the Common Law Procedure Acts, 15 & 16 Vict. c. 76, 17 & 18 Vict.

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c. 125, and 23 & 24 Vict. c. 126. The portions of the first of these statutes bearing on the present subject are as follows. The 35th section enacts, "In case it shall Sect. 35. appear at the trial of any action that there has been a misjoinder of plaintiffs, or that some person or persons, not joined as plaintiff or plaintiffs, ought to have been so joined, and the defendant shall not, at or before the time of pleading, have given notice in writing that he objects to such nonjoinder, specifying therein the name or names of such person or persons, such misjoinder or nonjoinder may be amended, as a variance, at the trial by any court of record holding plea in civil actions, and by any judge sitting at nisi prius, or other presiding officer, in like manner as to the mode of amendment, and proceedings consequent thereon, or as near thereto as the circumstances of the case will admit, as in the case of amendments of variances" under 3 & 4 Will. 4, c. 42, "if it shall appear to such court, or judge, or other presiding officer, that such misjoinder or nonjoinder was not for the purpose of obtaining an undue advantage, and that injustice will not be done by such amendment, and that the person or persons, to be added as aforesaid, consent, either in person or by writing, under his, her, or their hands, to be so joined, or that the person or persons, to be struck out as aforesaid, were originally introduced without his, her, or their consent, or that such person or persons consent, in manner aforesaid, to be so struck out; and such amendment shall be made upon such terms as the court, or judge, or other presiding officer, by whom such amendment is made, shall think proper; and when any such amendment shall have been made, the liability of any person or persons, who shall have been added as co-plaintiff or co-plaintiffs, shall, subject to any terms imposed as aforesaid, be the same as if such person or persons had been originally joined in such action." The 37th section, after giving power to the court or Sect. 37.

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a judge in the case of the joinder of too many defendants in an action of contract, to strike out the superfluous ones before trial, proceeds to enact, that "in case it shall appear at the trial of any action on contract that there has been a misjoinder of defendants, such misjoinder may be amended, as a variance, at the trial, in like manner as the misjoinder of plaintiffs has been hereinbefore directed to be amended, and upon such terms as the court, or judge, or other presiding officer, by whom such amendment is made, shall think proper." By the 222nd section, "it shall be lawful for the Superior Courts of Common Law, and every judge thereof, and any judge sitting at nisi prius, at all times to amend all defects and errors in any proceeding in civil causes, whether there is anything in writing to amend by or not, and whether the defect or error be that of the party applying to amend, or not; and all such amendments may be made with or without costs, and upon such terms as to the court or judge may seem fit; and all such amendments as may be necessary for the purpose of determining in the existing suit the real question in controversy between the parties shall be so made." By the 96th section of the second of these statutes, a like power of amendment is given of all defects and errors in any proceedings under its provisions; with this difference, that it says all such amendments as may be necessary for the purpose of determining in the existing suit the real question in controversy between the parties shall be so made "if duly applied for." The third gives with respect to proceedings under its provisions a like power with the second.

Sect. 222.

17 & 18 Vict. c. 125, s. 96.

23 & 24 Vict. c. 126, s. 36.

Other statutes.

§ 289. The power of amendment has been extended by other statutes to other kinds of proceedings. E. g. by the 16 & 17 Vict. c. 107, s. 263, "In all suits or proceedings at the suit of the Crown for the recovery of

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any duty or penalty, or the enforcement of any forfeiture under any act relating to the customs, the like amendments may be made by the court or judge as may be made in civil actions." By 20 & 21 Vict. c. 77, s. 37, on the trial of questions by a jury under the order of the Court of Probate, that Court has the same power, jurisdiction and authority as a judge at nisi prius: and by 20 & 21 Vict. c. 85, s. 38, the same holds in trials by jury under the order of the Court for Divorce and Matrimonial Causes. And by 22 & 23 Vict. c. 21, s. 9, it is enacted, that "section 222 of 'The Common Law Procedure Act, 1852,' shall extend to all suits and proceedings on the revenue side of the Court of Exchequer."

Effect of these statutes.

§ 290. In exercising the discretion vested in them by these statutes, courts and judges are of course much guided by the decisions which have taken place on the subject; and which, it must be acknowledged, are by no means in conformity with each other (*c*). It will be sufficient to state, that, in the first place, it seems no judge ought to make an amendment the effect of which would be to deprive him of jurisdiction over the cause (*d*). Again, as these statutes were passed to carry out the spirit of the law, and not to supersede it, no pleading ought to be amended so as to render it bad in law (*e*). Under the 3 & 4 Will. 4, c. 42, s. 23, it was held that a judge ought not to amend a plea so as to render it liable to special demurrer (*f*); and since special demurrers are abolished, it would probably be considered that he

(*c*) See a large number collected in the note to *Bristow* v. *Wright*, 1 Smith, L. C. 570, 5th Ed.

(*d*) *Wickes* v. *Grove*, 2 Jur. N. S. 212, 213, per Martin, B.

(*e*) *Evans* v. *Powis*, 1 Exch. 601; *Martyn* v. *Williams*, 1 H. & N. 817; *Bury* v. *Blogg*, 12 Q. B. 877; *Graham* v. *Gracie*, 13 *Id.* 548; *Hughes* v. *Bury*, 1 Fost. & F. 374.

(*f*) *Bury* v. *Blogg*, 12 Q. B. 887; *Hassall* v. *Cole*, 13 Jurist, 630.

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ought not to amend a pleading so as to render it calculated to prejudice, embarrass or delay an opponent within the meaning of the 15 & 16 Vict. c. 76, s. 52. And, lastly, it is to be observed generally, that the courts in banc are very chary of interfering with the discretion of judges at nisi prius in granting or refusing amendments; unless where the point is reserved for their consideration by consent of parties at the trial.

In criminal cases.

§ 291. It will be observed that, while the 9 Geo. 4, c. 15, extends to trials for misdemeanors, the 3 & 4 Will. 4, c. 42, s. 23, the Common Law Procedure Acts —the 15 & 16 Vict. c. 76, 17 & 18 Vict. c. 125, 23 & 24 Vict. c. 126—and the other statutes above referred to, are, for the most part, restricted to civil cases. But the 11 & 12 Vict. c. 46, s. 4, empowers any court of oyer and terminer and general gaol delivery, if such court shall see fit so to do, to cause the indictment or information for any offence whatever, when any variance or variances shall appear between any matter in writing or in print produced in evidence, and the recital or setting forth thereof in the indictment or information whereon the trial is pending, to be forthwith amended in such particular or particulars by some officer of the court, and after such amendment the trial shall proceed in the same manner in all respects, &c. as if no such variance or variances had appeared.

11 & 12 Vict. c. 46, s. 4.

14 & 15 Vict. c. 100, s. 1.

§ 292. A far greater alteration in the law on this part of the subject has however been effected by the 14 & 15 Vict. c. 100, some portions of which have been already referred to (*g*). This statute enacts in its first section that "Whenever on the trial of any indictment for any felony or misdemeanor there shall appear to be any

(*g*) *Suprà*, § 284.

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variance between the statement in such indictment and the evidence offered in proof thereof, in the name of any county, riding, division, city, borough, town corporate, parish, township, or place mentioned or described in any such indictment, or in the name or description of any person or persons, or body politic or corporate, therein stated or alleged to be the owner or owners of any property, real or personal, which shall form the subject of any offence charged therein, or in the name or description of any person or persons, body politic or corporate, therein stated or alleged to be injured or damaged, or intended to be injured or damaged by the commission of such offence, or in the christian name or surname, or both christian name and surname, or other description whatsoever, of any person or persons whomsoever therein named or described, or in the name or description of any matter or thing whatsoever therein named or described, or in the ownership of any property named or described therein, it shall and may be lawful for the court before which the trial shall be had, if it shall consider such variance not material to the merits of the case, and that the defendant cannot be prejudiced thereby in his defence on such merits, to order such indictment to be amended, according to the proof, by some officer of the court or other person, both in that part of the indictment where such variance occurs and in every other part of the indictment which it may become necessary to amend, on such terms as to postponing the trial to be had before the same or another jury, as such court shall think reasonable; and after any such amendment the trial shall proceed, whenever the same shall be proceeded with, in the same manner in all respects, and with the same consequences, &c., as if no such variance had occurred, &c.: Provided that in all such cases where the trial shall be so postponed as aforesaid, it shall be lawful for such court to respite

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the recognizances of the prosecutor and witnesses, and of the defendant, and his surety or sureties, if any, accordingly, &c.: Provided also, that where any such trial shall be to be had before another jury, the crown and the defendant shall respectively be entitled to the same challenges as they were respectively entitled to before the first jury was sworn."

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PART II.

THE SECONDARY RULES OF EVIDENCE.

§ 293. THE SECONDARY rules of evidence, as has been already stated, are those rules which relate to the *modus probandi*, or mode of proving the matters that require proof(*a*), and for the most part only affect evidence *in causâ* (*b*). The fundamental principle of the common law on this subject is, that THE BEST EVIDENCE MUST BE GIVEN—a maxim the general meaning of which has been explained in a former part of this work (*c*). In certain cases, however, peculiar forms of proof are either prescribed or authorized by statute. We propose to treat the whole matter in the following order:— The *secondary* rules of evidence.

1. Direct and Circumstantial evidence.
2. Presumptive evidence, Presumptions, and Fictions of law.
3. Primary and Secondary evidence.
4. Derivative evidence in general.
5. Evidence supplied by the acts of third parties.
6. Opinion evidence.
7. Self-regarding evidence.
8. Evidence rejected on grounds of public policy.
9. Authority of Res judicata.
10. Quantity of evidence required.

(*a*) *Suprà*, § 249.
(*b*) Bk. 1, pt. 1, § 86.
(*c*) Bk. 1, pt. 1, §§ 87 *et seq.*

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Chapter I.

DIRECT AND CIRCUMSTANTIAL EVIDENCE.

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Two forms of judicial evidence.

§ 294. ALL judicial evidence is either *direct* or *circumstantial.* By "Direct evidence" is meant when the principal fact, or factum probandum, is attested *directly* by witnesses, things, or documents. To all other forms the term "Circumstantial evidence" is applied; which may be defined, that modification of *indirect* evidence, whether by witnesses, things, or documents, which the law deems sufficiently proximate to a principal fact or factum probandum, to be receivable as evidentiary of it. And this also is of two kinds, *conclusive* and *presumptive:* "Conclusive," when the connexion between the principal and evidentiary facts—the factum probandum and factum probans—is a *necessary* consequence of the laws of nature; as where a party accused of a crime shews that, at the moment of its commission, he was at another place, &c.: "Presumptive," when the inference of the principal fact from the evidentiary is only *probable,* whatever be the degree of persuasion which it may generate (*a*).

Direct evidence.

Circumstantial evidence.

Conclusive.

Presumptive.

(*a*) Introd. pt. 1, § 27.

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Direct and circumstantial evidence equally *admissible.*

§ 295. As regards *admissibility*, direct and circumstantial evidence stand, generally speaking, on the same footing. It might at first sight be imagined that the latter, especially when in a presumptive shape, is inferior or secondary to the former, and, by analogy to the principle which excludes secondhand and postpones secondary evidence (*b*), ought to be rejected, at least when direct evidence can be procured. The law is, however, otherwise, and a little reflection will shew the difference between the cases. Secondhand and secondary evidence are rejected, because they derive their force from something kept back—the non-production of which affords a presumption that it would, if produced, make against the party by whom it is withheld. But circumstantial evidence, whether conclusive or presumptive, is as *original* in its nature as direct evidence:—they are distinct modes of proof, acting as it were in parallel lines, wholly independent of each other. Suppose an indictment against A. for the murder of B., killed by a sword. If C. saw A. kill B. with a sword, his evidence of the fact would be *direct.* If, on the other hand, a short time before the murder, D. saw A. with a drawn sword, walking towards the spot where the body was found, and after the lapse of a time long enough for its commission, saw him returning with the sword bloody; these *circumstances* are wholly independent of the evidence of C.—they derive no force whatever from it—and, coupled with others of a like nature, might generate quite as strong a persuasion of guilt. Besides, the rule, that facts are provable by circumstances as well as by direct testimony, has a considerable effect in preventing guilty or dishonest parties from tampering or making away with witnesses and other instruments of evidence, which they would be more likely to do, if they knew that the only evidence against them that the law would receive was contained in a few

(*b*) See *infrà*, ch. 4 and 3.

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easily-ascertained depositories. Still, the non-production of direct evidence which it is in the power of a party to produce, is matter of observation to a jury (*c*), as indeed is the suppression of any sort of proof. And here it is essential to observe that the process of reasoning evidencing any fact, principal or subalternate, may be more or less complex, longer or shorter. The inference may be drawn from one evidentiary fact, or from a combination—usually, although perhaps not very accurately, termed a *chain* (*d*),—of evidentiary facts (*e*). Again, the facts from which the inference is drawn may be either themselves proved to the satisfaction of the tribunal, or they may be merely consequences, necessary or probable as the case may be, of other facts thus proved (*f*).

Comparison between direct and presumptive evidence.

§ 296. Direct and presumptive evidence (using the words in their technical sense) being, as has been shewn, distinct modes of proof, have each their peculiar advantages and characteristic dangers. Abstractedly speaking, presumptive evidence is inferior to direct evidence, seeing that it is in truth only a substitute for it, and an indirect mode of proving that which otherwise might not be provable at all (*g*). Hence a given portion of credible direct evidence, must ever be superior to an equal portion of credible presumptive evidence *of the same fact*. But in practice it is, from the nature of

(*c*) 1 Stark. Ev. 578, 3rd Ed.; *Id.* 874, 4th Ed.; 2 Ev. Poth. 340; 3 Benth. Jud. Ev. 230.

(*d*) "It has been said that circumstantial evidence is to be considered as a *chain*, and each piece of evidence as a link in the chain; but that is not so, for then, if any one link broke, the chain would fall. It is more like the case of a rope composed of several cords. One strand of the cord might be insufficient to sustain the weight, but three stranded together may be quite of sufficient strength." Per Pollock, C. B., in *Reg.* v. *Exall*, 4 F. & F. 922, 929.

(*e*) 3 Benth. Jud. Ev. 223.

(*f*) 2 Ev. Poth. 332; 3 Benth. Jud. Ev. 3.

(*g*) Gilb. Ev. 157, 4th Ed.; *R.* v. *Burdett*, 4 B. & A. 95, 123; Theory of Presumptive Proof, p. 55.

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things, impossible, except in a few rare and peculiar cases, to obtain more than a very limited portion of direct evidence as to any fact, especially any fact of a criminal kind; and with the probative force of such a limited portion of direct evidence, that of a chain of evidentiary facts, forming a body of presumptive proof, may well bear comparison. When proof is direct, as, for instance, where it consists of the positive testimony of one or two witnesses; the matters proved are more proximate to the issue, or, to speak correctly, are identical with the physical facts of it, and consequently leave but two chances of error—namely, those which arise from mistake or mendacity on the part of the witnesses: while in all cases of merely presumptive evidence, however long and apparently complete the chain, there is a third,—namely, that the inference from the facts proved may be fallacious (*h*). Besides, there is an anxiety felt for the detection of crimes, particularly such as are very heinous or peculiar in their circumstances, which often leads witnesses to mistake or exaggerate facts, and tribunals to draw rash inferences; and there is also natural to the human mind a tendency to suppose greater order and conformity in things than really exists, and likewise a sort of pride or vanity in drawing conclusions from an isolated number of facts, which is apt to deceive the judgment (*i*). Sometimes, also, hasty and erroneous conclusions in such cases are traceable to indolence, or to aversion for the patient and accurate consideration of minute and ever-varying particulars (*j*). Accordingly, the true meaning of the expressions in our books, that all presumptive evidence of felony should be warily pressed, admitted cautiously, &c., is, not that it is inca-

Advantages of direct over presumptive evidence.

(*h*) 3 Benth. Jud. Ev. 249; Ph. & Am. Ev. 459; Bonnier, Traité des Preuves, § 637.

(*i*) Bacon, Nov. Organ. Aphor. 45; *R.* v. *Hodge*, 2 Lew. C. C. 227, per Alderson, B.; Ph. & Am. Ev. 459; Burrill, Circ. Ev. 207. See further, *infrà*, sect. 3, subsect. 2.

(*j*) Burrill, Circ. Ev. 207.

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pable of producing a degree of assurance equal to that derivable from direct testimony, but that in its application tribunals should be upon their guard against the peculiar dangers just described. Such are its disadvantages. But then, on the other hand, a chain of presumptive evidence has some decided advantages over the direct testimony of a limited number of witnesses. These are thus clearly stated by an able modern writer (*k*).

Advantages of presumptive over direct evidence.

"1. By including in its composition a portion of circumstantial evidence, the aggregate mass on either side is, if mendacious, the more exposed to be disproved. Every false allegation being liable to be disproved by any such notoriously true fact as it is incompatible with; the greater the number of such distinct false facts, the more the aggregate mass of them is exposed to be disproved: for it is the property of a mass of circumstantial evidence, in proportion to the extent of it, to bring a more and more extensive assemblage of facts under the cognizance of the judge. 2. Of that additional mass of facts, thus apt to be brought upon the carpet by circumstantial evidence, parts more or less considerable in number will have been brought forward by so many different deposing witnesses. But, the greater the number of deposing witnesses, the more seldom will it happen that any such concert, and that a successful one, has been produced, as is necessary to give effect to a plan of mendacious testimony, in the execution of which, in the character of deposing witnesses, divers individuals are concerned. 3. When, for giving effect to a plan of mendacious deception, direct testimony is of itself, and without any aid from circumstantial evidence, regarded as sufficient; the principal contriver sees before him a comparatively extensive circle, within which he may expect to find a mendacious witness, or an assortment of mendacious witnesses, sufficient to his

(*k*) 3 Benth. Jud. Ev. 251—2. See also Paley's Moral and Political Philosophy, bk. 6, ch. 9.

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purpose. But where, to the success of the plan, the fabrication or destruction of an article of circumstantial evidence is necessary, the extent of his field of choice may in this way find itself obstructed by obstacles not to be surmounted."

Lest too much reliance should be placed on these considerations, it is important to observe that circumstantial evidence does not always consist, either of a large number of circumstances or of circumstances attested by a large number of witnesses; and, also, that the more trifling any circumstance is in itself, the greater is the probability of its being inaccurately observed and erroneously remembered (*l*). But, after every deduction made, it is impossible to deny, that a conclusion drawn from a process of well conducted reasoning on a mass of evidence purely presumptive may be quite as convincing, and in some cases far more convincing, than one arising from a limited portion of direct testimony (*m*).

(*l*) 19 Ho. St. Tr. 74, note.

(*m*) 1 East, P. C. 223; *Annesley* v. *The Earl of Anglesea*, 17 Ho. St. Tr. 1430, per Mounteney, B.; Paley's Mor. Philos. bk. 6, ch. 9.

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CHAPTER II.

PRESUMPTIVE EVIDENCE, PRESUMPTIONS AND FICTIONS OF LAW.

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Design of this chapter.

§ 297. THE nature and admissibility of both direct and presumptive evidence having been considered in the preceding chapter, we proceed in the present to examine the latter more in detail, together with the kindred subjects of presumptions and fictions of law.

Probative force of a chain of presumptive proof.

§ 298. The elements, or links, which compose a chain of presumptive proof are certain moral and physical coincidences, which individually indicate the principal fact; and the probative force of the whole depends on the *number, weight, independence, and consistency* of those elementary circumstances. A number of circumstances, each individually very slight, may so tally and confirm each other as to leave no room for doubt of the fact which they tend to establish (*a*). "Infirmiora [argumenta] congreganda sunt * * * *. Singula levia sunt, et communia: universa vero nocent, etiamsi non ut fulmine, tamen ut grandine" (*b*). Not to speak of

(*a*) For a good instance, see *Richardson's case*, Append. No. 1.

(*b*) Quint. Inst. Orat. lib. 5, c. 12.

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greater numbers; even two articles of circumstantial evidence,—though each taken by itself weigh but as a feather,—join them together, you will find them pressing on a delinquent with the weight of a mill-stone (*c*). Thus, on an indictment for uttering a bank-note, knowing it to be counterfeit, proof that the accused uttered a counterfeit note amounts to nothing, or next to nothing, —any person might innocently have a counterfeit note in his possession, and offer it in payment. But suppose further proof adduced, that, shortly before the transaction in question, he had in another place, and to another person, offered in payment another counterfeit note of the same manufacture, the presumption of guilty knowledge becomes strong (*d*). If, however, all the circumstances proved arise from one source, they are not *independent* of each other; and an increase in the number of the circumstances will not in such a case increase the probability of the hypothesis (*e*). It is of the utmost importance to bear in mind that, where a number of *independent* circumstances point to the same conclusion, the probability of the justness of that conclusion is not the *sum* of the simple probabilities of those circumstances, but is the compound result of them (*f*).

(*c*) 3 Benth. Jud. Ev. 242.

(*d*) *R.* v. *Wylie*, or *Whiley*, 1 B. & P. N. R. 92, 2 Leach, C. L. 983; *R.* v. *Ball*, R. & R. C. C. 132, 1 Campb. 324; *R.* v. *Green*, 3 Car. & K. 209. See also *R.* v. *Jarvis*, 1 Dearsl. C. C. 552, and *R.* v. *Foster*, *Id.* 456.

(*e*) Beccaria, Dei Delitti e delle Pene, § 7; 1 Stark. Ev. 567, 3rd Ed.; *Id.* 851, 4th Ed.

(*f*) 1 Stark. Ev. 568, 3rd Ed.; *Id.* 853, 4th Ed.; 2 Ev. Poth. 342. The position, that the degree of assurance of the guilt of an accused person, derived from a long and connected chain of presumptive evidence, may equal, and in many cases far exceed, that derived from a limited portion, (and in most criminal cases it must necessarily be a very limited portion,) of direct testimony, is strongly illustrated by the mathematical formulæ of the calculns of probabilities, to which reference has been made in the Introduction to this work, pt. 2, § 73, note (*s*). Suppose 2 persons, A. and B., are charged with 2 distinct acts equally criminal — say, for instance, 2 distinct murders—and, in order to simplify the question, let us conceive the probability of

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Lastly, the circumstances composing the chain must all be *consistent* with each other,—a principle obvious in itself, and which will be further illustrated hereafter (*g*).

Presumption. Original signification of.

§ 299. The term "presumption," in its largest and most comprehensive signification, may be defined, where, in the absence of actual certainty of the truth or false-

the principal fact equal in both cases. The evidence against A. is altogether direct, consisting of the positive testimony of *two witnesses*, of apparently equal credit, E. and F. The probability of the truth of their united testimony, depends on the values assignable to m and n in the expressions $\frac{m^p}{m^p+n^p}$ and $\frac{n^p}{m+n^p}$ in that note. Suppose, further, that the probability of the guilt of the accused, A., arising from the evidence of each of these witnesses taken singly, is to the contrary probability in the proportion of 1000 : 1. The effect of this is to render $m=1000$, $n=1$, and $p=2$. Substituting these values in those expressions we shall have $\frac{m^p}{m^p+n^p}=\frac{(1000)^2}{(1000)^2+1}=\frac{1000000}{1000001}$; and $\frac{m^p}{m^p+n^p}=\frac{1}{1000001}$; or, the probability of truth is to that of error as *a million* to unity. Return now to the case of B., all the evidence against whom is purely circumstantial and presumptive. Instead of *two* witnesses to the fact, there are *twenty-four circumstances* adduced in evidence. The probability of guilt, resulting from each singly, to that of innocence, we will take as low as 2 : 1. We then have $m=2$, $n=1$, and $p=24$. Substituting these values as before, we get $\frac{m^p}{m^p+n^p}=\frac{16777216}{16777216+1}$, and $\frac{n^p}{m^p+n^p}=\frac{1}{16777216+1}$; or, the probability of his guilt is to that of his innocence in a proportion exceeding *sixteen millions* to unity. But instead of a large number of circumstances, each giving a very slight degree of probability, let us suppose, what is far more usual in practice, the circumstances to be fewer in number and stronger in themselves. With this view we will assume $m=10$, $n=1$, and $p=8$. Substituting these values in $\frac{m^p}{m^p+n^p}$ and $\frac{n^p}{m^p+n^p}$, these expressions will become $\frac{100'000'000}{100'000'001}$ and $\frac{1}{100'000'001}$; i. e. the probability of the guilt of the accused will be that of his innocence in the proportion of *one hundred millions* to unity. It will, of course, be understood that these numbers are only assumed for the purpose of illustration; but the above expressions clearly shew, that, however high the credit of an eye-witness be taken, circumstances may so accumulate as to give a probability greater than any assignable.

(*g*) *Infrà*, sect. 3, sub-sect. 2.

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hood of a fact or proposition, an inference, affirmative or disaffirmative of that truth or falsehood, is drawn by a process of probable reasoning from something proved or taken for granted (*h*). It is, however, rarely employed

(*h*) "Præsumptio nihil est aliud, qnàm argnmentum verisimile, communi sensu perceptum ex eo, quod plerumque fit, aut fieri intelligitur." Matthæus de Crimin. ad lib. 48 Dig. tit. 15, c. 6, N. 1. The definition of Huberus, Præl. Jur. Civ. lib. 22, tit. 3, N. 14, is much the same—"Anticipatio judicii, de rebus incertis, ex eo, quod plerumqne fit, percepta." See also *id.* N. 3. "Est nihil aliud præsumptio qnàm opinio ex probabili ratiocinatione concepta." Vinnius, Jurispr. Contr. lib. 4, cap. 36. "Præsnmptio est probatio negotii dubii ex probabilibus argumentis." G. A. Struvius, Syntag. Jur. Civ. Exercit. 28, Art. XV. "Præsumptio est probatio per argumenta probabilia facta." Westenbergius, Principia Juris, lib. 22, tit. 3, § 21. See also *id.* § 4. "Præsumptio est collectio, seu illatio probabilis, ex argumentis per rerum circumstantias, frequenter evenientibus, conjiciens." Strauchius, ad Univ. Jus Privat. &c. Dissert. 25, Aphor. 33. Voet, Ad Pand. lib. 22, tit. 3, n. 14, says presumptions are "Conjecturæ ex signo verisimili ad probandum assumptæ; vel opiniones de re incertâ, necdum penitùs probatâ." "On peut définer la présomption, un jugement que la loi ou l'homme porte sur la vérité d'une chose, par une conséquence tirée d'une autre chose. Ces conséquences sont fondées sur ce qui arrive communément et ordinairement." Pothier, Traité des Obligations, Part. 4, ch. 3, sect. 2, § 839. See also Bonnier, Traité des Preuves, § 635. "A presumption of any fact is, properly, an inferring of that fact from other facts that are known; it is an act of reasoning; and much of human knowledge on all subjects is derived from this source. * * * In matters that regard the conduct of men, the certainty of mathematical demonstration cannot be required or expected." Per Abbott, C. J., in *R.* v. *Burdett*, 4 B. & A. 95, 161, 162. "Where the existence of one fact so necessarily and absolutely induces the supposition of another, that if the one is true, the other cannot be false, the term presumption cannot be legitimately applied." 2 Ev. Poth. 329. See also Locke on the Human Understanding, B. 4, ch. 14, § 4. The following very different definition is however given in an able treatise on the Law of Evidence. "A *presumption* may be defined to be an inference as to the existence of one fact, from the existence of some other fact, founded upon a previous experience of their connection. To constitute such a presumption, a previous experience of the connection between the known and inferred facts is essential, of such a nature that, as soon as the existence of the one is established, admitted, or assumed,

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Legal signification of.

in jurisprudence in this extended sense. Like "presumptive evidence" (*i*), it has there obtained a restricted

the inference as to the existence of the other immediately arises, independently of any reasoning on the subject. It also follows, from the above definition, that the inference may be either *certain*, or not certain, but merely *prebable*, and therefore capable of being rebutted by proof to the contrary. According to some writers, the term *presumption* is not strictly applicable where the inference is a necessary one, and absolutely conclusive, as where it is founded on the certain and invariable course of nature. * * * * * Such a distinction appears however to be an unnecessary one; and it may well be doubted whether the distinction be founded on sound principles. The Roman lawyers used the term in the more extensive sense. Their *præsumptio juris et de jure* was conclusive." 3 Stark. Ev. 927, 3rd Ed. With respect to this last observation, it is to be remarked that the præsumptio juris et de jure of the Roman law derived its conclusive effect, not from the supposed force of the inference, but because the law superadded something to its own presumption. That sort of presumption is defined both by Alciatus and Menochius "dispositio legis aliquid præsumentis, et super præsumpto, tanquam sibi comperto, statuentis." Alciatus de Præs. Pars 2, N. 3; Menochius, de Præs. lib. 1, quæst. 8, N. 1. "Præsumptio juris et de jure," says Vinnius, Jurisp. Contract. lib. 4, cap. 36, "dicitur, cum lex ipsa præsumit et simul disponit: si modò præsumptio, ac non potiùs juris quædam constitutio dicenda est." And the same may be said of the conclusive presumptions of our own law, in which "the rule of law merely attaches itself to the circumstances, when proved; it is not deduced from them. It is not a rule of inference from testimony; but a rule of protection, as expedient, and for the general good." 1 Greenl. Ev. § 32, 7th Ed. The use of presumption as a generic term, applicable to certain as well as to contingent inferences, is indeed justified by the example of some other distinguished writers (Menoch. de Præs. lib. 1, quæst. 3; &c. quæst. 7, NN. 2 & 3; Titius, Jus Privat. lib. 2, c. 11, § 14, &c.); but their authority is overborne by those collected above, the number of which might easily be increased. Try the question by this test. Would it be correct to say that sexual intercourse is *presumed* from parturition; or that innocence is *presumed* from proof of an alibi? Nor does the quality above attributed to presumptions as their essential ingredient, namely, that the inference is made without any exercise of the reasoning faculties, rest on a much better foundation. The inferring one fact from another must ever be an act of

(*i*) See Introd. pt. 1, § 27, and *supra*, § 294.

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legal signification; and is used to designate an inference, affirmative or disaffirmative, of the existence of some fact, drawn by a judicial tribunal, by a process of probable reasoning, from some matter of fact, either judicially noticed, or admitted, or established by legal evidence to the satisfaction of the tribunal (*j*).

§ 300. But the English term "Presumption," as well as the Latin "Præsumptio," has been used by jurists and lawyers in several different senses. An attentive examination of the subject will detect at least seven. 1. The original or primary sense stated in the preceding article. 2. The strict legal sense there explained. 3. A generic term including every sort of *rebuttable* presumption; i. e., rebuttable presumptions of law, strong presumptions of fact, mixed presumptions, or masses of evidence, direct or presumptive, which shift the burden of proof to the opposite party. It is only in this sense that the well known maxim, "Stabitur præsumptioni donec probetur in contrarium," holds good. And here it will be necessary to advert to the language of L. C. B. Gilbert (*k*), who says, that presumption is defined by the civilians, "Conjectura ex certo signo proveniens, quæ alio (non) adducto pro veritate habetur." This is far from correct—the above definition seems taken from a somewhat similar one given by Alciatus and Menochius of presumptions of *law* (*l*); but is wholly inapplicable either to præsumptiones juris et de jure, whose very nature is to exclude

Different meanings of.

reasoning, however rapid the process, or however obvious the inference; and although the law has in some cases added to particular facts, an artificial weight beyond their natural tendency to produce belief, still many legal presumptions are only natural presumptions of fact recognized and enforced by law.

(*j*) See Domat, Lois Civiles, P. 1, liv. 3, tit. 6, Préamb. & sect. 4; 2 Ev. Poth. 332.

(*k*) Gilb. Evid. 156, 157, 4th Ed.

(*l*) Alciat. de Præs. Pars 3, N. 1; Menoch. de Præs. lib. 1, quæst. 8, N. 1.

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all proof against what they assume as true, or to those presumptions of fact which are too slight to shift the burden of proof. 4. A generic term applicable to certain as well as to contingent inferences (*m*). 5. On the other hand, the word presumption has even been restricted to the sense of *irrebuttable* presumption (*n*). 6. The popular sense of presumptuousness, arrogance, blind adventurous confidence, or unwarrantable assumption (*o*). 7. The Latin "præsumptio" had, at one time at least, another signification. In the Leges Hen. 1, c. 10, § 1, we find the expression "Præsumpcio terre vel pecunie regis," where "præsumptio" is used in the sense of "invasio," "intrusio," or "usurpatio" (*p*). Some others will be found in Mascard. de Prob. quæst. 10; and Müller's note (*a*) to Struvius' Syntag. Jur. Civ. Exercit. 28, § XV. The confusion necessarily consequent on so many meanings for the same word, joined to the great importance and natural difficulty of the subject of judicial presumptions, fully justify Alciatus (*q*) in speaking of it, as "Materia valde utilis et quotidianâ in practicâ, sed confusa, inextricabilis ferè."

Explanation of certain expressions.

§ 301. Before proceeding farther, it seems advisable to advert to certain expressions used by the civilians

(*m*) Menoch. de Præs. lib. 1, quæst. 3; & quæst. 7, NN. 2 & 3; Titius, Jus Privat. lib. 2, c. 11, §14, &c.; 3 Stark. Ev. 927, 3rd Ed.

(*n*) Grounds and Rudiments of Law, p. 186, 2nd Ed.; Branch, Max. p. 107, 5th Ed.; and Halkerston's Max. p. 79.

(*o*) Doct. & Stud. c. 26; Litt. R. 327; Hargr. Co. Litt. 155 b, note (5); 4 & 5 Will. & M. c. 23, s. 10; 1 Geo. 1, c. 13, s. 17, stat. 2; 19 Geo. 3, c. 56, s. 3; 11 Geo. 4 & 1 Will. 4, c. 23, s. 5; 6 & 7 Will. 4, c. 76, s. 8; 8 & 9 Vict. c. 87, s. 10. The Latin "præsumptio" is frequently used in this sense by Bracton (see fol. 1 b, §§ 7 and 8; 6 a, § 5; 221 b, § 2): as also by the civilians and canonists; Mascard. de Prob. quæst. 10, NN. 1, 5 & 6; Alciat. de Præs. Pars 2, N. 1; &c. See also the form of the commission of the peace, Dalt. Countr. Just. 16, 18; Archb. Justice of the Peace.

(*p*) See the Ancient Laws and Institutes of England, A.D. 1840, Vol. 1, p. 519, note (*b*), and Glossary.

(*q*) Alciat. de Præs. P. 1, N. 1.

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and canonists to indicate different kinds of proof, and the degrees of conviction resulting from them, which, although in a great degree obsolete, are not undeserving of notice. These are, "Argumentum, "Indicium," "Signum," "Conjectura," "Suspicio," and "Adminiculum." The term "Argumentum" included every species of inference from indirect evidence, whether conclusive or presumptive (*r*). "Indicium"—"Indice" in the French law—answers to that form of circumstantial evidence in ours where the inference is only presumptive, and was used to designate the fact giving rise to the inference rather than the inference itself. Under this head were ranked the recent possession of stolen goods, vicinity to the scene of crime, sudden change of life or circumstances, &c. (*s*). By "Signum" was meant indirect evidence coming under the cognizance of the senses: such as stains of blood on the person of a suspected murderer, indications of terror on being charged with an offence, &c. (*t*). "Conjectura" and "Suspicio" were not so much modes of proof as expressions denoting the strength of the persuasion generated in the mind by evidence. The former is well defined, "Rationabile vestigium latentis veritatis, unde nascitur opinio sapientis" (*u*); or a slight degree of credence caused by evidence too weak or too remote to produce belief, or even suspicion. It is only in the character of "indicative" evidence that this has any place in English law (*x*). "Suspicio" is a stronger term—"Passio animi aliquid firmiter non eligentis" (*y*). E. g. A. B. is found mur-

sions used by the civilians and canonists.

(*r*) See Matthæus de Crimin. ad lib. 48 Dig. tit. 15, cap. 6, N. 1; and Vinnius, Jurisp. Contr. lib. 4, cap. 25 & 36.

(*s*) Mascard. de Prob. lib. 1, quæst. 15; Menochius de Præs. lib. 1, quæst. 7; Encyclopédie Méthodique, tit. Jurisprudence, Art. Indices; Bonnier, Traité des Preuves, §§ 14 & 636.

(*t*) Quintil. Inst. Orat. lib. 5, c. 9; Menoch. de Præs. lib. 1, quæst. 7, NN. 31—37.

(*u*) Mascard. de Prob. quæst. 14, N. 14.

(*x*) See bk. 1, pt. 1, § 93.

(*y*) Menochius de Præs. lib. 1, quæst. 8, N. 41.

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dered; and C. D., a man of bad character, is known to have had an interest in his death: this might give rise to a *conjecture* that he was the murderer; and if in addition to this he had, a short time before the murder, been seen near the spot where the body was found, the feeling in favour of his guilt might amount to *suspicion*. "Adminiculum," as its etymon implies, meant any sort of evidence, which is useless if standing alone, but useful to corroborate other evidence (*z*). These distinctions may appear subtilties to us, but for many reasons they were not without their use in the systems where they are found. The decision of all questions of law and fact was there entrusted to a single judge, one of the few limitations to whose power was, that the accused could not be put to the torture in the absence of a certain amount of evidence against him (*a*).

Division of the subject.

§ 302. In dealing with this important subject, we propose to treat it in the following order:—

1. Presumptive evidence, presumptions generally, and fictions of law.
2. Presumptions of law and fact, and of mixed law and fact, usually met in practice.
3. Presumptions and presumptive evidence in criminal law.

Section I.

PRESUMPTIVE EVIDENCE, PRESUMPTIONS GENERALLY, AND FICTIONS OF LAW.

Division.

§ 303. It is clear that presumptive evidence, and the presumptions to which it gives rise, are not indebted for their probative force to positive law. When inferring

(*z*) Menoch. de Præs. lib. 1, quæst. 7, NN. 57, 58, 59.

(*a*) Decret. Gratian. lib. 5, tit. 41, cap. 6; Matth. de Prob. cap. 2, N. 80.

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the existence of a fact from others, courts of justice (assuming the inference properly drawn) do nothing more than apply, under the sanction of the law, a process of reasoning which the mind of any intelligent being would have applied for itself under similar circumstances; and the force of which rests altogether on experience and observation of the course of nature, the constitution of the human mind, the springs of human action, the usages and habits of society, &c. (*b*). All such inferences are called by our lawyers "Presumptions of *fact*," or "Natural presumptions," and, by the civilians, "Præsumptiones hominis" (*c*); in order to distinguish them from others of a technical kind, more or less of which are to be found in every system of jurisprudence, known by the name of "Presumptiones juris," or "Presumptions of *law*" (*d*). To these two classes may be added a third, which, as partaking in some degree of the nature of each of the former, may be called "Præsumptiones mixtæ," "*Mixed* presumptions," or "Presumptions of mixed law and fact." And as presumptions of fact are both unlimited in number, and from their very nature are not so strictly the object of legal science as presumptions of law (*e*), we purpose, in accordance with the example of other writers on evidence, to deal with the latter first, together with the kindred subject of fictions of law. We shall then treat of the former, together with mixed presumptions; and the present section will conclude with a notice of conflicting presumptions.

(*b*) "The presumption of a malicious intent to kill, from the deliberate use of a deadly weapon, and the presumption of aquatic habits in an animal found with webbed feet, belong to the same philosophy, differing only in the instance, and not in the principle, of its application." 1 Greenl. Ev. § 14, 7th Ed.

(*c*) Mascardus de Prob. Conclus. 1226, however, restricts the expression "naturæ præsumptio" to presumptions derived from the ordinary course of nature.

(*d*) See Introd. pt. 2, §§ 42 & 43.

(*e*) Phil. & Am. Ev. 457.

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Sub-Section I.

PRESUMPTIONS OF LAW, AND FICTIONS OF LAW.

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Presumptions of law.

§ 304. Presumptions, or, as they are also called, "Intendments" of law, and by the civilians, "Præsumptiones seu positiones juris," are inferences or positions established by law, common or statute; and have been shewn, in the Introduction to this work (*f*), for reasons which it is unnecessary here to repeat, to be indispensable to every well-regulated system of jurisprudence. They differ from presumptions of fact and mixed presumptions in two most important respects. 1st, that in the latter a discretion, more or less extensive, as to drawing the inference is vested in the tribunal, while in those now under consideration the law peremptorily requires a certain inference to be made, whenever the

(*f*) Introd. pt. 2, §§ 42 & 43.

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facts appear which it assumes as the basis of that inference. If, therefore, a judge direct a jury contrary to a presumption of law, a new trial is grantable *ex debito justitiæ* (*g*); and if a jury, or even a succession of juries, disregard such a presumption new trials will be granted, *toties quoties*, as matter of right (*h*). But when any other species of presumption is overlooked or disregarded, the granting of a new trial is matter for the discretion of the court, which will be more or less liberal in this respect according to the nature and strength of the presumption. 2nd, (and here it is that the difference between the several kinds of presumptions is so strongly marked,) as presumptions of law are, in reality, rules of law, and part of the law itself, the court may draw the inference whenever the requisite facts are developed in pleading, &c. (*i*); while all other presumptions, however obvious, being inferences of fact, cannot be made without the intervention of a jury.

Grounds of.

§ 305. The grounds of these præsumptiones juris are various. Some of them are natural presumptions which the law simply recognizes and enforces. Thus, the legal maxim that every one must be presumed to intend the natural consequence of his own act (*k*): and, therefore, that he who sets fire to a building intended injury to its owner; and that he who lays poison for, or discharges loaded arms at another, intended death or bodily harm to that person; merely establishes as law a principle to which the reason of man at once assents. But in most of the presumptions which we are now considering, the inference is only *partially* approved by reason, the law, from motives of policy, attaching to the facts which give

(*g*) Phil. & Am. Ev. 464; *Haire* v. *Wilson*, 9 B. & C. 643.

(*h*) Phil. & Am. Ev. 459; 1 Ph. Ev. 467, 10th Ed.; *Tindal* v. *Brown*, 1 T. R. 167—171.

(*i*) Steph. Plead. 391—392, 5th Ed.; 1 Chitty, Plead. 221, 6th Ed.

(*k*) 3 M. & Selw. 15; 9 B. & C. 645; *R.* v. *Sheppard*, R. & R. C. C. 169; *R.* v. *Farrington*, *Id.* 207.

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rise to it an artificial effect beyond their natural tendency to produce belief. Thus, although a receipt for money under hand and seal, naturally gives rise to a presumption of payment, still it does not *necessarily* prove it; and the conclusive effect of such a receipt is a creature of the law (*l*). So, the maxim by which a party who kills another is presumed to have done it maliciously, seems to rest partly on natural equity and partly on policy. To these may be added a third class, in which the principle of legal expediency is carried so far, as to establish inferences not perceptible to reason at all, and perhaps even repugnant to it. Thus, when the law punishes offences, even mala prohibita, on the assumption that all persons in the kingdom, whether natives or foreigners, are acquainted with the common and general statute law, it manifestly assumes that which has no real existence whatever, though the arbitrary inference may be dictated by the soundest policy.

Irrebuttable presumptions of law, or Præsumptiones juris et de jure.

§ 306. A very important distinction exists among presumptions of law,—namely, that some are absolute and conclusive, called by the common lawyers *Irrebutable presumptions*, and by the civilians *Præsumptiones juris et de jure;* while others are conditional, inconclusive, or *rebuttable*, and are called by the civilians *Præsumptiones juris tantùm*, or simply *Præsumptiones juris*. The former kind of presumption has been most accurately defined by the civilians, "Dispositio legis aliquid præsumentis, et super præsumpto, tanquam sibi comperto, statuentis." They add "Præsumptio *juris* dicitur, quia lege introducta est; et *de jure*, quia super tali præsumptione lex inducit firmum jus, et habet eam pro veritate" (*m*). In a word, they are inferences which the law makes so peremptorily, that it will not allow them to be overturned by any contrary proof, however strong.

(*l*) Gilb. Ev. 158, 4th Ed.

(*m*) Alciatus de Præs. Pars 2, N. 3; Menochius de Præs. lib. 1, quæst. 3, N. 17; Poth. Obl. § 807.

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Thus, where a cause has once been regularly adjudicated upon by a competent tribunal, from which there is no appeal, the whole matter assumes the form of res judicata; and evidence will not be admitted, in subsequent proceedings between the same parties, to shew that decision erroneous (*n*). An infant under the age of seven years is not only presumed incapable of committing felony, but the presumption cannot be rebutted by the clearest evidence of a mischievous discretion (*o*). So, a bond or other specialty is presumed to have been executed for good consideration, and no proof can be admitted to the contrary (*p*), unless the instrument is impeached for fraud (*q*). A receipt under hand and seal is conclusive evidence of the payment of money (*r*); and in the time of the old feudal tenures it was an irrebutable presumption of law, that a person under the age of twenty-one was incapable of performing knight service (*s*).

Number of.

§ 307. These conclusive presumptions have varied considerably in the course of our legal history. Certain presumptions which in earlier times were deemed absolute and irrebuttable, have, by the opinion of later judges, acting on more enlarged experience, either been ranged among præsumptiones juris tantùm, or considered as presumptions of fact to be made at the discretion of a jury (*t*). On the whole, modern courts of justice are slow to recognize presumptions as irrebuttable, and disposed rather to restrict than to extend their number. To preclude a party by an arbitrary rule from adducing evidence which, if received, would compel a

(*n*) See *infrà*, ch. 9.

(*o*) 1 Hale, P. C. 27—8; 4 Blackst. Comm. 23.

(*p*) Plowd. 308—9; 2 Stark. Ev. 930, 3rd Ed.; *Id.* 747, 4th Ed.

(*q*) Stark. in loc. cit. See bk. 2, pt. 3, § 220.

(*r*) Gilb. Ev. 158, 4th Ed.

(*s*) Litt. sect. 103; Co. Litt. 78 b.

(*t*) Ph. & Am. Ev. 460; 1 Phil. Ev. 469, 10th Ed.

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decision in his favour, is an act which can only be justified by the clearest expediency and soundest policy; and some presumptions of this class ought never to have found their way into it.

Use of.

§ 308. Præsumptiones juris et de jure are not, however, without their use. On the contrary, when restrained within due limits, they exercise a very salutary effect in the administration of justice, by throwing obstacles in the way of vexatious litigation, and repressing inquiries where sound and unsuspected evidence is not likely to be obtained. Among the most useful in these respects, may be ranked the principle which upholds the authority of res judicata, the intendments made by the courts to support the verdicts of juries, and, as expounded in modern times, the doctrine of estoppel.

Fictions of law.

§ 309. "Fictions of law" are closely allied to irrebuttable presumptions of law. "Fictio est legis, adversus veritatem, in re possibili, ex justâ causâ, dispositio" (*u*): in other words, where the law, for the advancement of justice, assumes as fact, and will not allow to be disproved, something which is false, but not impossible. The difference between fictions of law and præsumptiones juris et de jure consists in this, that the latter are arbitrary inferences which may or may not be true; while in the case of fictions the falsehood of the fact assumed is understood and avowed (*x*). "Super falso et certo fingitur, super incerto et vero præsumitur" (*y*). Thus, the præsumptio juris et de jure that infants under the

(*u*) Gothofred. Not. 3, ad lib. 22 Dig. tit. 3; Westenbergius. Principia Juris, ad lib. 22 Dig. tit. 3, § 28; Huberus, Positiones Juris, ad lib. 22 Dig. tit. 3, N. 25; Menochius de Præs. lib. 1, quæst. 8; 3 Blackst. Comm. 43, note (*b*). See also 2 Rol. 502, and Palm. 354.

(*x*) Huberus, Præl. Jur. Civ. lib. 22, tit. 3, N. 21; Voet. ad Pand. lib. 22, tit. 3, N. 19; Alciatus de Præs. Pars 1, N. 4.

(*y*) Gothof. Not. (3) ad lib. 22 Dig. tit. 3.

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age of seven years are doli incapaces for felonious purposes (*z*), is probably true in general, though false in particular instances; but when, in order to give jurisdiction to the courts at Westminster, the law used to feign that a contract which was really entered into at sea was made in some part of England (*a*), the assumption was avowedly false, and a fiction in the completest sense of the word.

Use of.

§ 310. Fictions of law, as justly observed by Mr. Justice Blackstone (*b*), though they may startle at first, will be found on consideration to be highly beneficial and useful. Like artificial presumptions, however, they have also their abuse; for we sometimes find them introduced into the jurisprudence of a country without adequate cause, or retained in it after their utility has ceased. They are invented, say the civilians, "ad conciliandam æquitatem cum ratione et subtilitate juris" (*c*); and it is a well known maxim of the common law, "in fictione juris semper subsistit æquitas" (*d*); in furtherance of which principle the two following rules have been laid down.

Rules respecting.

1st. Must not prejudice innocent parties.

§ 311. First, fictions are only to be made for necessity, and to avoid mischief (*e*), and, consequently, they must never be allowed to work prejudice or injury to an innocent party (*f*): "Fictio juris non operatur damnum vel injuriam" (*g*). Thus, when a man seised in fee of lands marries, and makes a feoffment to another, who grants a rent-charge out of it to the feoffor and his wife,

(*z*) 1 Hale, P. C. 27–28; 4 Blackst. Comm. 23.

(*a*) 3 Blackst. Comm. 107; 4 Inst. 134.

(*b*) 3 Blackst. Comm. 43.

(*c*) Voet. ad Pand. lib. 22, tit. 3, N. 19.

(*d*) 3 Blackst. Comm. 43; Co. Litt. 150 a; 10 Co. 40 a; 11 Co. 51 a.

(*e*) 3 Co. 30 a, *Butler and Baker's case.*

(*f*) *Id.* 29; 11 Co. 51 a; 13 Co. 21 a.

(*g*) Palm. 354. See also 3 Co. 36 a; 2 Rol. 502; 9 Exch. 45.

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and to the heirs of the feoffor, the feoffor dies, and his wife recovers the moiety of the land for her dower by custom, she may distrain but for half of the rent-charge; for although, by fiction of law, her claim of dower is above the rent, yet, if that fiction were carried so far as to allow her to distrain for the whole rent, it would work a wrong to a third person, which the law will not allow (*h*). So, although the vouchee in a common recovery was, by fiction of law, considered tenant of the land so far as to enable him to levy a fine to the demandant, or to accept a fine or release from him; still, as the vouchee had really nothing in the land, a fine by him to a stranger, or a fine or release to him from a stranger, was void (*i*).

2nd. Must have a possible subject-matter.

§ 312. Secondly, it is said to be a rule that the matter assumed as true must be something physically possible (*k*). "Lex non intendit aliquid impossibile" (*l*). "Lex non cogit ad impossibilia" (*m*). "Nulla impossibilia sunt præsumenda" (*n*). Thus, says Huberus,

(*h*) Co. Litt. 150 a.

(*i*) *Id.* 265 b; 3 Co. 29 b.

(*k*) Huberus, Præl. Jur. Civ. lib. 22, tit. 3, N. 22; Alciatus, de Præs. Pars 1, N. 5; Devot. Inst. Canon. lib. 3, tit. 9, § 28, not. 2, 5th Ed. "Chescun fiction doit estre *ex re possibili;* ceo ne serra d'impossible, car le ley imitate nature;" per Doddridge, J., in *Sheffeild* v. *Rateliffe*, 2 Rol. 501. The existence of this rule has been denied, and especially by Titius (Jus Privatum, &c. lib. 1, cap. 9, §§ 1 & 13), who says of fictions in general, "totus iste fictionum apparatus, non tantum non necessarius, sed inutilis ineptusque;" and he adduces, as instances of feigned impossibilities, the 26th Constitution of the Emperor Leo, entitled, "ut eunuchi adoptare possint;" and also the fact, that a child in ventre sa mère is susceptible of many rights, just as if it had been actually born. In the latter of these cases, however, the fiction involves no impossibility, its only operation being with relation to time; and with respect to the former, it is clear from the preamble of the constitution in question, that the right to adopt given to the persons in the condition there mentioned, was conferred on them as an indulgence, without any reference to a supposed power of procreation.

(*l*) 12 Co. 89.

(*m*) Co. Litt. 92 a, 231 b, 9 Co. 73 a; Hob. 96.

(*n*) Co. Litt. 78 b.

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where a man devises his property, on condition that the devisee shall do a certain act within a limited time after the death of the devisor; until that time has expired with the condition unperformed, the deceased cannot be said to have died intestate; because the condition, when performed, has a retrospective effect to the time of the death. But if the limited time be allowed to elapse with the condition unperformed, no subsequent performance of it can have relation back to the day of the death; for this would involve the absurdity of a man who had already died intestate being deemed to have died testate at a time subsequent to his decease (*o*).

§ 313. Fictions of law are of three kinds: affirmative or positive fictions, negative fictions, and fictions of relation (*p*). In the case of affirmative fictions something is assumed to exist which in reality does not; such as the fiction of lease, entry, and ouster, in actions of ejectment, previous to the 15 & 16 Vict. c. 76; the old fiction that the plaintiff in all suits on the law side of the Exchequer was accountant to the Crown (*q*); and the ac etiam clause in writs, by means of which the Court of Queen's Bench preserved its jurisdiction over matters of debt after the passing of 13 Car. 2, c. 2, st. 2 (*r*), &c. In negative fictions, on the contrary, that which really exists is treated as if it did not. Thus, a disseisee, after his re-entry, may maintain trespass for injury done to the freehold during his disseisin, on the principle that, so far as the disseisor and his servants are concerned, the freehold must be taken never to

Kinds of.

1. Affirmative.

2. Negative.

(*o*) Huberus, Præl. Jur. Civ. lib. 22, tit. 3, N. 22.

(*p*) "Tres constitui solent species. 1. *Affirmativa, Positiva,* seu *Inductiva,* qua aliquid ponitur seu inducitur, quod non est. 2. *Negativa* seu *Privativa,* qua id, quod revera est, fingitur, ac si non esset. 3. *Translativa,* qua id, quod est in uno, transfertur in aliud." Westenbergius, Principia Juris, lib. 22, tit. 3, § 29.

(*q*) 3 Blackst. Comm. 46.

(*r*) *Id.* 287, 288.

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3. Of relation. To persons. To things. To place. To time.

have been divested out of the disseisee (*s*). Fictions of relation are of four kinds (*t*):—First, where the act of one person is taken to be the act of another; as where the act or possession of a servant is deemed the act or possession of his master. So, where a felonious act is done by one person in the presence of others who are aiding or abetting him, the act of that one is, in contemplation of law, the act of all (*u*). "Qui per alium facit, per seipsum facere videtur" (*x*). Second, where an act done by or to one thing is taken, by relation, as done by or to another; as where the possession of land is transferred by livery of seisin, or a mortgage of land is created by delivery of the title-deeds. Third, fictions as to place; as, in the case already put, of a contract made at sea, or abroad, being treated as if made in England, and the like (*y*). There is a curious instance of this kind of fiction in the civil law, by which Roman citizens who were made prisoners by an enemy, were on their return home supposed never to have been prisoners at all, and were entitled to civil rights as if they had not been out of their own country (*z*). Fourth (and lastly), fictions as to time. Thus, where a feoffment was made with livery of seisin, a subsequent attornment by the tenant was held to relate back to the time of the livery (*a*). It is on this principle that the title of an executor or administrator to the goods of the testator or intestate, relates back to the time of his death, and does not take effect merely from the probate, or grant of the letters of administration (*b*)—

(*s*) 11 Co. 51 a, *Liford's case.* See also *Barnett* v. *The Earl of Guildford*, 11 Exch. 19.

(*t*) "Translatio fit. 1. *A personâ in personam.* 2. *De re ad rem.* 3. *De loco ad locum.* 4. *De tempore ad tempus.*" Westenbergius, Principia Juris, lib. 22, tit. 3, § 30.

(*u*) 1 Hale, P. C. 437.

(*x*) Co. Litt. 258 a. See Dig. lib. 43, tit. 16, l. 1, § 12.

(*y*) 3 Blackst. Comm. 107.

(*z*) Dig. lib. 49, tit. 15, l. 12, § 6.

(*a*) 3 Co. 29 a.

(*b*) See the cases on this subject collected in *Tharpe* v. *Stall-*

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an extremely useful fiction, to prevent the property of the deceased being made away with. And it is a fixed principle that ratification has relation back to the time of the act done,—"Omnis ratihabitio retrotrahitur et mandato æquiparatur"(*c*), a maxim, which has been well explained in some modern cases(*d*), and was also known in the Roman law(*e*). This kind of fiction is also largely to be found in the procedure of the courts, where it is every day's practice to deliver pleadings, sign judgments, and do many other acts, nunc pro tunc(*f*).

Rebuttable presumptions of law, or Præsumptiones juris tantùm.

§ 314. The other kind of presumptions of law, which we have called Rebuttable presumptions, or Præsumptiones juris tantùm, has been thus correctly defined by one of the civilians, "Præsumptio juris dicitur, quæ ex legibus introducta est, ac pro veritate habetur; donec probatione aut præsumptione contrariâ fortiore enervata fuerit"(*g*). Every word of this sentence is worthy of attention. First, like the former class, these presumptions are intendments made by law; but, unlike them, they only hold good until disproved. Thus, although the

wood, 5 Man. & Gr. 760; also *Foster* v. *Bates*, 12 M. & W. 226, *Morgan* v. *Thomas*, 8 Exch. 302, and *Barnett* v. *The Earl of Guildford*, 11 Exch. 19.

(*c*) Co. Litt. 180 b, 207 a, 245 a, 258 a; 9 Co. 106 a; 4 Inst. 317; 1 Wms. Saund. 264 b, note (*e*), 6th Ed.; 3 B. Moore, 619; 6 Scott, N. R. 896; 2 Exch. 185 and 188; 4 *Id.* 790, 798; 7 H. & N. 693.

(*d*) *Wilson* v. *Tummon*, 6 Scott, N. R. 894, 6 Man. & Gr. 236; *Bird* v. *Brown*, 4 Exch. 786; *Buron* v. *Denman*, 2 Exch. 167; *Secretary of State in Council of India* v. *Kamachee Boye Sahaba*, 13 Mo. P. C. C. 22.

(*e*) Dig. lib. 46, tit. 3, l. 12, § 4; lib. 43, tit. 16, l. 1, § 14; lib. 3, tit. 5, l. 6, § 9; Cod. lib. 4, tit. 28, l. 7.

(*f*) See further, on the subject of fictions generally, Finch, Law, 66; and on fictions by relation, *Butler and Baker's case*, 3 Co. 25 a, and 2 Roll. Abr. tit. Relation, and Trespass per Relation.

(*g*) Voct. ad Pand. lib. 22, tit. 3, N. 15. Another civilian, more ancient, defines a presumption of law, "Animi legislatoris ad verisimile applicatio, onus probandi transferens." Baldus, in Rubr. Cod. de Probat. N. 8.

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law presumes all bills of exchange and promissory notes to have been given and indorsed for good consideration, it is competent for certain parties affected by these presumptions to falsify them by evidence (*h*). So, the legitimacy of a child born during wedlock, may be rebutted, by proof of the absence of the opportunity for sexual intercourse between its supposed parents (*i*). So, while the law presumes every infant between the ages of seven and fourteen to be incapable of committing felony, as being doli incapax, still a mischievous discretion may be shewn; for, malitia supplet ætatem (*k*). And there are many instances of children under the age of fourteen being punished capitally. To this class also belong the well-known presumptions in favour of innocence, and sanity, and against fraud, &c.; the presumption that legal acts have been performed with the solemnities required by law, that every person discharges the duties or obligations which the law casts upon him (*l*), &c. The concluding words of the definition of this species of presumptions shew, that they may be rebutted by presumptive as well as by direct evidence, and that the weaker presumption will give place to the stronger (*m*).

(*h*) 3 Stark. Ev. 930, 3rd Ed.; *Id.* 747, 4th Ed.; Byles on Bills, ch. 10, 8th Ed.

(*i*) See on this subject, *infrà*, sect. 2, sub-sect. 3.

(*k*) 1 Hale, P. C. 26; 4 Blackst. Comm. 23; 12 Ass. pl. 30.

(*l*) *Infrà*, sect. 2, sub-sect. 3 and 4.

(*m*) *Infrà*, sub-sect. 3.

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Sub-Section II.

PRESUMPTIONS OF FACT, AND MIXED PRESUMPTIONS.

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§ 315. We now return to a more particular examination of Præsumptiones hominis, or Presumptions of fact; in treating of which it is proposed to consider, 1st. The grounds or sources whence they are derived; 2nd. Their probative force. We shall then briefly explain the nature of Præsumptiones mixtæ, or Presumptions of mixed law and fact; and, lastly, shew the extent to which the discretion of juries in drawing pre- Presumptions of fact.

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sumptive inferences is controlled or reviewed by courts of law.

1°. Grounds and sources of.

§ 316. 1°. The grounds or sources of presumptions of fact are obviously innumerable—they are co-extensive with the facts, both physical and psychological, which may, under any circumstances whatever, become evidentiary in courts of justice (*n*):—but, in a general view such presumptions may be said to relate to *things, persons*, and the *acts and thoughts* of intelligent agents (*o*).

Presumptions relating to things.

With respect to the first of these, it is an established principle that conformity with the ordinary course of nature ought always to be presumed. Thus, the order and changes of the seasons; the rising, setting, and course of the heavenly bodies, and the known properties of matter, give rise to very important presumptions relative to physical facts, or things.

To persons.

The same rule extends to persons. Thus, the absence of those natural qualities, powers and faculties which are incident to the human race in general, will never be presumed in any individual; such as the impossibility of living long without food, the power of procreation within the usual ages, the possession of the reasoning faculties, the common and ordinary understanding of man, &c. (*p*). To this head are reducible the presumptions which juries are sometimes called on to make relative to the duration of human life, the time of gestation, &c.

To the acts and thoughts of intelligent agents.

Under the third class, namely, the acts and thoughts of intelligent agents, come, among others, all psychological facts; and here most important inferences are drawn from the ordinary conduct of mankind, and the natural feelings or impulses of human nature. Thus, no man

(*n*) "Desumitur [præsumptio] ex personis, ex causis, ex loco, ex tempore, ex qualitate, ex silentio, ex familiaritate, ex fugâ, ex negligentiâ, ex vicinià, ex obscuritate, ex eventu, ex dignitate, ex ætate, ex quantitate, ex amore, ex societate, &c." Matthæns de Probationibns, c. 2, n. 1.

(*o*) Huberus, Præl. Jur. Civ. lib. 22, tit. 3, n. 17.

(*p*) *Id.*

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will ever be presumed to throw away his property, as, for instance, by paying money not due (*q*); and it is a maxim, that every one must be taken to love his own offspring more than that of another person, &c. (*r*). Many presumptions of this kind are founded on the customs and habits of society; as, for instance, that a man to whom several sums of money are owing by another, will call in the debts of longest standing first, &c. (*s*). Nor is this confined to the human race, for similar presumptions may be derived from the instincts of animals (*t*).

2°. Probative force of presumptive evidence.

§ 317. 2°. The vast field over which presumptive reasoning extends, must render ineffectual any attempt to reduce into definite classes the presumptions to which it gives rise, according to their degree of probative force. Some classification, however, has generally been deemed convenient (*u*), and there is one which, on the strength of certain high authorities, seems to have become embodied into our law of evidence. "Many times," says Sir Edward Coke (*v*), "juries, together with other matter, are much induced by presumptions; whereof there be three sorts, viz. violent, probable, and light or temerary. *Violenta præsumptio* is many times plena probatio; *præsumptio probabilis* moveth little; but *præsumptio levis seu temeraria* moveth not at all." "Præsumptio violenta valet in lege" (*x*). As an instance of violenta præsumptio, amounting to plena probatio, Sir Edward Coke (*y*), and in this he is followed

Division of presumptions of fact into violent, probable, and light.

(*q*) Voet. ad Pand. lib. 22, tit. 3, n. 15; Dig. lib. 22, tit. 3, l. 25.

(*r*) Co. Litt. 373 a. See also 2 Inst. 564.

(*s*) Gilb. Ev. 157-158, 4th Ed.; 1 Ev. Poth. § 812; Cod. lib. 10, tit. 22, l. 3.

(*t*) Huber. Præl. Jur. Civ. lib. 22, tit. 3, N. 16; Goodeve, Evid. 52.

(*u*) A large number, taken from the works of the earlier civilians, are collected by Menochius, de Præs. lib. 1, quæst. 2.

(*v*) Co. Litt. 6 b.

(*x*) Jenk. Cent. 2, Cas. 3.

(*y*) Co. Litt. 6 b.

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by several other eminent authors (*z*), puts the case of one being run through the body with a sword in a house, who instantly dies of that wound; and then another man is seen to come out of that house with a bloody sword, and no other man was at that time in the house. "This," observes Chief Baron Gilbert (*a*), "is a violent presumption that he is the murderer; for the blood, the weapon, and the hasty flight, are all the necessary concomitants to such horrid facts; and the next proof to the sight of the fact itself, is the proof of those circumstances that do necessarily attend such fact." Notwithstanding the weight of authority in its favour, this illustration of violent presumption has been made the subject of much and deserved observation. If the authors just quoted mean to say, as their words imply, that there is no possible mode of reconciling the above facts with the innocence of the man seen coming out of the house, the proposition is monstrous! Any of the following hypotheses will reconcile them, and probably others might be suggested. First, that the deceased, with the intention of committing suicide, plunged the sword into his own body; and that the accused, not being in time to prevent him, drew out the sword, and so ran out, through confusion of mind, for surgical assistance (*b*). Second, that the deceased and the accused both wore swords; that the deceased, in a fit of passion, attacked the accused; and that the accused, being close to the wall, had no retreat, and had just time enough to draw his sword, in the hope of keeping off the deceased, who, not seeing the sword in time, ran upon it and so was killed (*c*). Third, that the deceased may in fact have been murdered, and that the real murderer may

(*z*) 2 Hawk. P. C. c. 46, s. 42; 1 Stark. Ev. 562, 3rd Ed.; *Id.* 843, 4th Ed.; Gilb. Evid. 157, 4th Ed., &c. See also note (*f*), p. 431.

(*a*) Gilb. Evid. in loc. cit.

(*b*) 3 Benth. Jud. Ev. 236; Burnett's Crim. Law Scotl. 508.

(*c*) 3 Benth. Jud. Ev. 236, 237.

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have escaped, leaving a sword sticking in or lying near the body, and the accused coming in may have seized the sword and run out to give the alarm (*d*). Fourth, that the sword may have been originally used in an attack by the accused on the deceased, and wrenched from, and afterwards turned against the deceased by the accused, under danger of attack on his life by pistol or otherwise (*e*). Perhaps, however, Sir Edward Coke and Chief Baron Gilbert only meant, that the above facts would constitute a sufficient primâ facie case to call on the accused for his defence, and, in the absence of explanation by him, would warrant the jury in declaring him guilty (*f*).

Doubtful utility of.

§ 318. The utility of the classification of presumptions of fact into violent, probable and light is questionable (*g*); but if thought desirable to retain it, the following good illustration is added from a well-known work on criminal law. "Upon an indictment for stealing in a dwelling-house, if the defendant were apprehended a few yards

(*d*) Goodeve, Evid. 32.

(*e*) *Id.*

(*f*) Their language seems to have heen so understood hy Mounteney, B., in the case of *Annesley* v. *The Earl of Anglesea* (17 Ho. St. Tr. 1430). Mr. Starkie however says, that the circumstances wholly and necessarily exclude any hut *one* hypothesis. (1 Stark. Ev. 562, 3rd Ed.; *Id.* 844, 4th Ed.) The illustration given by Sir Edward Coke of a violent presumption is very ancient, and seems to have been a favourite hoth among the early civilians and the common law lawyers. The facts stated in the text are expressly adduced by Bartolus, in the 14th century, and other writers of that and snbsequent periods, as conclusive proof of murder, (Bartolus, Comment. in 2ndam partem Dig. Novi, de Furtis, 121 a, Ed. Lugd. 1547); and they were deemed, in our own law, sufficient to support a counterplea to a wager of battle, and thus oust the appellee of his right to invoke the judgment of heaven. Staundf. P. C. lib. 3, c. 15, Counterplees al Battaile; Bracton, lib. 3, fol. 137. See also Britton, fol. 14. Their inconclusiveness, however, did not escape the notice of some of the more enlightened civilians, hoth before and since the time of Coke. See Boerius, Qnæstiones, 168; Voet. ad Pand. lib. 22, tit. 3, N. 14, &c.

(*g*) 2 Gr. Russ. 727. It is retained in Devotus, Instit. Canon. lib. 3, tit. 9, § 30, Paris, 1852.

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from the outer door, with the stolen goods in his possession, it would be a violent presumption of his having stolen them; but if they were found in his lodgings some time after the larceny, and he refused to account for his possession of them, this, together with proof that they were actually stolen, would amount, not to a violent, but to a probable presumption merely; but, if the property were not found recently after the loss, as, for instance, not until sixteen months after, it would be but a light or rash presumption, and" (if it stood alone) "entitled to no weight"(*h*).

Division of presumptions of fact into *slight* and *strong*.

§ 319. A division of presumptions of fact, more accurate in principle and more useful in practice, is obtained by considering them with reference to their effect on the burden of proof, or onus probandi; the general principles and rules of which have been explained in the first part of the present Book (*i*). Præsumptiones hominis, or presumptions of fact, are divided into *slight* and *strong*, according as they are or are not of sufficient weight to shift the burden of proof (*j*).

Slight.

Slight presumptions, although sufficient to excite suspicion, or to produce an impression in favour of the truth of the facts they indicate, do not, when *taken singly*, either constitute proof or shift the burden of proof. Thus, stolen property found in the possession of the supposed criminal a long time after the theft, though well calculated to excite suspicion against him, is, when standing alone, insufficient even to put him on his defence (*k*). So, where money has been stolen, and

Do not constitute proof, or shift the burden of proof.

(*h*) Archb. Crim. Plead. 208, 15th Ed.

(*i*) *Suprà*, pt. 1, ch. 2.

(*j*) "Præsumptio [hominis] rectè dividitur in leviorem, et fortiorem. Levior movet suspicionem, et judicem quodammodo inclinat; sed per se nullum habet juris effectum, nec onere probandi levat." Huberus, Præl. Jur. Civ. lib. 22, tit. 3, N. 15. See also Matth. de Prob. c. 2, NN. 1 & 5; Westenbergius, Principia Juris, lib. 22, tit. 3, §§ 26, 27.

(*k*) *Suprà*, bk. 2, pt. 2.

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money, similar in amount and in the nature of the pieces, is found in the possession of another person, but none of the pieces are identified, and there is no other evidence against him (*l*). And in the civil law, where a guardian who originally had no estate of his own became opulent during the continuance of his guardianshisp, this fact, standing alone, was deemed insufficient to raise even a primâ facie case of dishonesty against him (*m*); the Code justly observing, "nec enim pauperibus industria, vel augmentum patrimonii quod laboribus, et multis casibus quæritur, interdicendum est" (*n*). To this class belong the presumption of guilt, derived from foot-marks resembling those of a particular person being found on the snow or ground near the scene of crime (*o*); the presumption of homicide from previous quarrels (*p*), or from the accused having a pecuniary interest in the death of the deceased (*q*).

§ 320. But although presumptions of this kind are of no weight when standing alone, still they not only form important links in a chain of evidence, and frequently render complete a body of proof which would otherwise be imperfect; but the concurrence of a large number of them may, (each contributing its individual share of probability,) not only shift the onus probandi, but amount to proof of the most convincing kind (*r*). "A man's having observed the ebb and flow of the tide to-day," observes an eminent divine (*s*), "affords some

Use and effect of.

(*l*) 1 Stark. Ev. 569, 3rd Ed.; *Id.* 854, 4th Ed.

(*m*) Voet. ad Pand. lib. 22, tit. 3, N. 14; 2 Ev. Poth. 345.

(*n*) Cod. lib. 5, tit. 51, l. 10.

(*o*) Mascardus de Probat. quæst. 8, NN. 21—23; *R.* v. *Britton*, 1 Fost. & F. 354.

(*p*) Domat, Lois Civiles, Part 1, liv. 3, tit. 6, Préamb.

(*q*) 3 Benth. Jud. Ev. 188.

(*r*) 1 Ev. Poth. art. 815, 816; Huberus, Præl. Jur. Civ. lib. 22, tit. 3, NN. 4 and 16; *Id.* Positiones Jur. sec. Pand. lib. 22, tit. 3, N. 19; Matth. de Crim. ad lib. 48 Dig. tit. 15, c. 6; Voet. ad Pand. lib. 22, tit. 3, N. 18; 1 Stark. Ev. 570, 3rd Ed.; *Id.* 855, 4th Ed.

(*s*) Butler's Analogy of Religion, Introduction.

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sort of presumption, though the lowest imaginable, that it may happen again to-morrow: but the observation of this event for so many days, and months, and ages together, as it has been observed by mankind, gives us a full assurance that it will." Convictions, even for capital offences, constantly take place on this kind of evidence (*t*); and the following good illustration, in a civil case, is given by Pothier from the text of the Roman law (*u*): "A sister was charged with the payment of a sum of money to her brother; after the death of the brother, there was a question, whether this was still due to his successor. Papinian decided (*v*), that it ought to be presumed, that the brother had released it to his sister, and he founded the presumption of such release on three circumstances; 1st. From the harmony which subsisted between the brother and the sister; 2nd. From the brother having lived a long time without demanding it; 3rd. From a great number of accounts being produced which had passed between the brother and sister, upon their respective affairs, in none of which there was any mention of it. Each of these circumstances, taken separately, would only have formed a simple presumption, insufficient to establish that the deceased had released the debt; but their concurrence appeared to Papinian to be sufficient proof of such release" (*w*).

Strong. Shift the burden of proof.

§ 321. *Strong* presumptions of fact, on the contrary, shift the burden of proof, even though the evidence to

(*t*) See *infrà*, sect. 3, and App.

(*u*) 1 Ev. Poth. art. 816.

(*v*) "Denied" in Evans's translation of Pothier is an obvious misprint.

(*w*) This is the law "Procula," which will be found Dig. lib. 22, tit. 3, l. 26. Sir W. D. Evans, in his valuable edition of Pothier, observes on this passage, that it does not sufficiently appear from the law, as given in the Digest, that the brother had lived any great length of time, or that harmony had existed between him and his sister. He seems, however, to have overlooked the phrase "quamdiu vixit," and the peculiar expression "desideratum."

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rebut them involve the proof of a negative (*x*). The evidentiary fact giving rise to such a presumption, is said to be "*primâ facie* evidence" of the principal fact of which it is evidentiary. Thus, possession is primâ facie evidence of property; and the recent possession of stolen goods is sufficient to call on the accused to shew how he came by them, and, in the event of his not doing so satisfactorily, to justify the conclusion that he is the thief who stole them (*y*). So, a receipt for rent accrued due subsequently to that sued for, is primâ facie evidence that all rent had been paid up to the time of giving the receipt—as it is unlikely that a landlord would not call in the debt of longest standing first (*z*). And a beautiful instance of this species of presumption is afforded by the celebrated judgment of Solomon; who, with the view of ascertaining which of two women who laid claim to a child was really the mother, gave orders, in their presence, for the child to be cut in two and a part given to each; on which the true mother's natural feelings interposed, and she offered rather to abandon her claim to the child than suffer it to be put to death (*a*).

Primâ facie evidence.

§ 322. Presumptions of this nature are entitled to great weight, and, when there is no other evidence, are generally decisive in civil cases (*b*). In criminal, and more especially in capital cases, a greater degree of caution is, of course, requisite, and the technical rules

Effect of.

(*x*) "Presumptio fortior vocatur, quæ determinat judicem, ut credat, rem certo modo se habere, non tamen quin sentiat, eam rem aliter se habere posse. Ideoque ejus hic est effectus, quod transferat onus probandi in adversarium, quo non probante, pro veritate habetur." Huberus, Præl. Jur. Civ. lib. 22, tit. 3, N. 16. See also, Heinec. ad Pand. Pars 4, § 124; Matth. de Prob. cap. 2, N. 5; Westenbergius, Principia Juris, lib. 22, tit. 3, § 27.

(*y*) See bk. 2, pt. 2.

(*z*) Gilb. Ev. 157, 4th Ed.

(*a*) 1 Kings, iii. 16.

(*b*) Huberus, Præl. Jur. Civ. lib. 22, tit. 3, N. 16.

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regulating the burden of proof are not always strictly adhered to (*c*).

Distinguishable from præsumptiones juris tantùm.

§ 323. The resemblance between inconclusive presumptions of law and strong presumptions of fact cannot have escaped notice—the effect of each being to assume something as true until rebutted; and, indeed, in the Roman law, and other systems where the decision of both law and fact is intrusted to a single judge, the distinction between them becomes in practice almost imperceptible (*d*). But it must never be lost sight of in the common law, where the functions of judge and jury should always be kept distinct. Unfortunately, however, the line of demarcation between the different species of presumptions has not always been observed with the requisite precision. We find the same presumption spoken of by judges, sometimes as a presumption of law, sometimes as a presumption of fact, sometimes as a presumption which juries should be advised to make, sometimes as one which it was obligatory on them to make, &c. (*e*).

(*c*) Huberus, Præl. Jur. Civ. lib. 22, tit. 3, N. 16. See *R. v. Hadfield*, 27 Ho. St. Tr. 1282, 1353.

(*d*) "Quælibet exempla fortiorum, quas diximus Præsumptionum, quatenus legibus prodita sunt, ad hanc classem" (scil. præs. jur.) "non malè referuntur, si hac distinctione placeat uti." Huberus, Præl. Jur. Civ. lib. 22, tit. 3, N. 18. See also, Gresley, Evidence in Eq. 483—4, 2nd Ed.

(*e*) Phill. & Am. Ev. 460, 461; 1 Phill. Ev. 470, 10th Ed. When such language is found in the judgments of the superior courts, it is not surprising that the proceedings of inferior ones should exhibit even greater inaccuracy and confusion. Nothing, for instance, is more common than to hear a jury told from the bench, that when stolen property is found in the possession of a party shortly after a theft, *the law presumes him to be the thief;*—a direction both wrong and mischievous,—as calculated to convey to the minds of the jury the false impression, that when the possession of the stolen property has been traced to the accused, their discretionary functions are at an end. Our ablest judges tell juries in such cases that they ought, as men of common sense, to make the presumption, and act upon it, unless

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Mixed presumptions.

§ 324. We now come to the consideration of "Mixed presumptions;" or, as they are sometimes called, "Presumptions of mixed law and fact," and "Presumptions of fact recognized by law." These hold an intermediate place between the two former; and consist chiefly of certain presumptive inferences which from their strength, importance, or frequent occurrence, attract as it were the observation of the law; and from being constantly recommended by judges and acted on by juries, become in time as familiar to the courts as presumptions of law, and occupy nearly as important a place in the administration of justice. Some also have been either introduced or recognized by statute. They are in truth a sort of quasi præsumptiones juris; and, like the strict legal presumptions, may be divided into three classes:— 1st. Where the inference is one which common sense would have made for itself; 2nd. Where an artificial weight is attached to the evidentiary facts beyond their mere natural tendency to produce belief; and, 3rd. Where from motives of legal policy juries are recommended to draw inferences which are purely artificial. The two latter classes are chiefly found, where long established rights are in danger of being defeated by technical objections, or by want of proof of what has taken place a great while ago; in which cases it is every day's practice for judges to advise juries to presume, without proof, the most solemn instruments, such as charters, grants, and other public documents, as likewise all sorts of private conveyances (*f*).

Grounds of.

Artificial presumptions formerly carried too far.

§ 325. Artificial presumptions of this kind require to be made with caution, and it must be acknowledged that the legitimate limits of the practice have often been very much overstepped (*g*). There are many cases

it be rebutted, either by the facts as they appear in the evidence for the prosecution, or by the evidence or explanation of the accused.

(*f*) *Infrà*, sect. 2, sub-sect. 5

(*g*) See *Doe* d. *Fenwick* v.

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on this subject in the books which cannot now be considered as law, and some of which even border on the ridiculous. Thus, in an action on the game laws, it was suggested that the gun with which the defendant fired was not charged with shot, but that the bird might have died in consequence of the fright; and the jury having given a verdict for the defendant, the court refused a new trial (*h*); and in another case, Lord Ellenborough is reported to have cited with approbation an expression of Lord Kenyon, that, in favour of modern enjoyment where no documentary evidence existed, he would presume two hundred conveyances, if necessary (*i*). So, in *Wilkinson* v. *Payne* (*j*), which was an action on a promissory note, given to the plaintiff by the defendant in consideration of his marrying the defendant's daughter, to which the defence set up was that the marriage was not a legal one, as the parties were married by licence when the plaintiff was under age, and there was no consent of his parents or guardians; it appeared in evidence that both his parents were dead when the marriage was celebrated, and there was no legal guardian; but that the plaintiff's mother, who survived the father, had, when on her deathbed, desired a friend to become guardian to her son, with whose approbation the marriage took place. It also appeared that, when the plaintiff came of age, his wife was lying on her deathbed, in extremis, and that she died in three weeks afterwards; but that in her lifetime she and the plaintiff were always treated by the defendant and his family as man and wife. Upon these facts, Grose, J., left to the jury to

Reed, 5 B. & A. 232, 236—7, per Abbott, C. J.; *Harmood* v. *Oglander*, 8 Ves. 106, 130, note (*a*), per Lord Eldon, C.; *Day* v. *Williams*, 2 C. & J. 460, 461, per Bayley, B.; *Doe* d. *Shewen* v. *Wroot*, 5 East, 132; *Gibson* v. *Clark*, 1 Jac. & W. 159, 161, note (*a*).

(*h*) Cited by Lord Kenyon in *Wilkinson* v. *Payne*, 4 T. R. 468, 469.

(*i*) *Countess of Dartmouth* v. *Roberts*, 16 East, 334, 339.

(*j*) 4 T. R. 468.

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presume a *subsequent* legal marriage, which they did accordingly, and found a verdict for the plaintiff, and the court refused a new trial (*k*). This case has been severely commented on by Sir W. D. Evans (*l*); and indeed, it is impossible not to assent to the observation, that rulings of this kind afford a temptation to juries to trifle with their oath, by requiring them to find as true, facts which are probably, if not obviously, false (*m*). Of late years more correct views have grown up; and in several modern cases judges have refused to direct certain artificial presumptions to be made (*n*). Still, when restrained within their legitimate limits, presumptions of this kind are not without their use. To suppose an absurdity, in order to meet the exigency of a particular case, must ever be fraught with mischief: but it is evidently different when, in conformity to a settled rule of practice, juries are directed to presume the existence of ancient documents, or the destruction of formal ones; or to make other presumptions on subjects necessarily removed from ordinary comprehension, but which the rules of law require to be submitted to and determined by them. Both judges and juries are frequently compelled, in obedience to the Statutes of Limitations and the strict presumptions of

Legitimate use of artificial presumptions.

(*k*) These are not the only instances which might be cited. See the case of *Powell* v. *Milbanke*, Cowp. 103 (n.), where Lord Mansfield advised a jury to presume a grant from the crown, on the strength of enjoyment under two presentations stolen from the crown. That case was condemned by Lord Eldon, C., in *Harmood* v. *Oglander*, 8 Ves. 106, 130, note (*a*), and was spoken of by Eyre, C. B., in *Gibson* v. *Clark*, 1 Jac. & W. 159, 161, note (*a*), as "presumption run mad." See, also, *Doe* d. *Bristowe* v. *Pegge*, 1 T. R. 758, note; and *Lade* v. *Holford*, B. N. P. 110.

(*l*) 2 Ev. Poth. 330. See, also, Gresley, Evid. in Eq. 485—6, 2nd Ed.; and per Parke, B., in *Doe* d. *Lewis* v. *Davies*, 2 M. & W. 511.

(*m*) 3 Stark. Ev. 934, 3rd Ed.; *Id.* 754, 4th Ed.; 2 Ev. Poth. 331.

(*n*) *Doe* d. *Fenwick* v. *Reed*, 5 B. & A. 232; *Doe* d. *Howson* v. *Waterton*, 3 *Id.* 149; *Doe* d. *Hammond* v. *Cooke*, 6 Bingh. 174; *Wright* v. *Smithies*, 10 East, 409; *R.* v. *The Chapter of Exeter*, 12 A. & E. 512.

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law, to assume as true, facts which in reality are not so; and the ends of justice may render a similar course necessary in the case of those mixed presumptions which, although not technically, are virtually made by law. Some of the most important of these presumptions have in modern times been erected by the legislature into rules of law (*o*).

Directions to juries respecting presumptions of fact and mixed presumptions.

§ 326. The terms in which presumptions of fact and mixed presumptions, should be brought under the consideration of juries by the court, depend on their weight, either natural or technical. When the presumption is one which the policy of law and the ends of justice require to be made, such as the existence of moduses, and other immemorial rights, from uninterrupted modern user, the jury should be told that they *ought* to make the presumption unless evidence is given to the contrary —it should not be left to them as a matter for their discretion (*p*). And the same seems to apply where the presumption is one of much natural weight and of frequent occurrence, as where larceny is inferred from the recent possession of stolen property, &c. In the case of presumptions of a less stringent nature, however, such a direction would be improper; and perhaps the best general rule is, that the jury should be *advised* or *recommended* to make the presumption (*q*). To lay down rules for all cases would of course be impossible; but the language of the courts, expressed in decided cases in regard to particular presumptions, may in general be expected to exercise considerable influence in the de-

(*o*) See 3 & 4 Will. 4, c. 42, s. 3; *infrà*, sect. 2, sub-sect. 7; 2 & 3 Will. 4, cc. 71 and 100; *infrà*, sect. 2, sub-sect. 5.

(*p*) *Shephard* v. *Payne* (in Cam. Scac.), 16 C. B., N. S. 132, 135; *Lawrence* v. *Hitch* (in Cam. Scac.), L. Rep., 3 Q. B. 521; *Jenkins* v. *Harvey*, 1 C. M. & R. 877; *Pilots of Newcastle* v. *Bradley*, 2 E. & B. 431. See, however, per Lord Denman in *Brune* v. *Thompson*, 4 Q. B. 543, 552.

(*q*) See *R.* v. *Joliffe*, 2 B. & C. 54. ante 431 note

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termination of future cases in which the like presumptions may arise (*r*).

New trials for disregard by juries of presumptions of fact or mixed presumptions.

§ 327. It has been already stated (*s*), as a characteristic distinction between presumptions of law and presumptions of fact, either simple or mixed, that when the former are disregarded by a jury a new trial is granted as matter of right, but that the disregard of any of the latter, however strong and obvious, is only ground for a new trial at the discretion of the court in banc (*t*). Now, although questions of fact are the peculiar province of a jury, the courts, by virtue of their general controlling power over every thing that relates to the administration of justice (*u*), will usually grant a new trial when an important presumption of fact, or an important mixed presumption, has been disregarded by a jury. But new trials will not always be granted when *successive* juries disregard such a presumption; and the interference of the court in this respect depends very much on circumstances. As a general rule it may be stated, that not more than one or two new trials would be granted (*v*). There are, however, some mixed presumptions which the policy of the law, convenience, and justice, so strongly require to be made that the courts will go farther in order to uphold them. The principal among these are the existence of prescriptive rights and grants from long continued possession (*x*), &c. It is, however, rather a strong propo-

(*r*) Phill. & Am. Ev. 461; 1 Phill. Ev. 470, 10th Ed.

(*s*) *Suprà*, § 304.

(*t*) Phill. & Am. Ev. 459; 1 Phill. Ev. 467, 10th Ed.; *Tindal* v. *Brown*, 1 T. R. 167.

(*u*) *Goodwin* v. *Gibbons*, 4 Burr. 2108; *Burton* v. *Thompson*, 2 Burr. 664.

(*v*) Phill. & Am. Ev 459—460. See *Foster* v. *Steele*, 3 Bing. N. C. 892; *Swinnerton* v. *The Marquis of Stafford*, 3 Taunt. 232; *Foster* v. *Allenby*, 5 Dowl. 619; *Davies* v. *Roper*, 2 Jurist, N. S. 167.

(*x*) *Jenkins* v. *Harvey*, 1 C. M. & R. 877, 895, per Alderson, B.; *Gibson* v. *Muskett*, 3 Scott, N. R. 419.

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sition to lay down, as is sometimes done (*y*), that the courts would set aside verdicts *ad infinitum* in such cases. That would be very like setting aside trial by jury; and where several sets of men on their oaths find in a particular way, it would be more reasonable to presume that they did not do so without good grounds.

Sub-Section III.

CONFLICTING PRESUMPTIONS.

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Maxim "Stabitur præsumptioni donec probetur in contrarium."

§ 328. It is obvious from what has been already said, that the maxim, "Stabitur præsumptioni donec probetur in contrarium" (*z*), must be understood with considerable limitation. That maxim is obviously inapplicable either to irrebuttable presumptions (*præsumptiones juris et de jure*), whose very nature is to exclude all contrary proof, or to those presumptions of fact which have been denominated slight (*præsumptiones leviores*); and it is, therefore, necessarily restricted to such presumptions of law or fact, mixed presumptions, and pieces or

(*y*) Gale on Easements, 95, 3rd Ed.; &c.

(*z*) Co. Litt. 373 b; 2 Co. 48 a; 2 Co. 73 b; Hob. 297; Jenk. Cent. 1, cas. 62; 3 Bl. C. 371.

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masses of presumptive evidence, as throw the burden of proof on the parties against whom they militate.

Conflicting presumptions.

§ 329. Rebuttable presumptions of any kind may be encountered by presumptive, as well as by direct evidence (*a*); and the court may even take judicial notice of a fact—such, for example, as the increase in the value of money—for the purpose of rebutting a presumption which would otherwise have arisen from uninterrupted modern usage (*b*). Again, it not unfrequently happens that the same facts may, when considered in different points of view, form the bases of opposite inferences; and in either of these cases it becomes necessary to determine the relative weight due to the conflicting presumptions. The relative weight of conflicting presumptions of *law* is, of course, to be determined by the court or judge,—who should also direct the attention of the jury to the burden of proof as affected by the pleadings, &c., and to the evidence in each case. And although the decision of questions of fact constitutes the peculiar province of the jury, they ought, especially in civil cases, to be guided by those rules regulating the burden of proof and the weight of conflicting presumptions, which are recognized by law, and have their origin in natural equity and convenience. It must not, however, be supposed that every præsumptio juris is *ex vi termini* stronger than every præsumptio hominis, or præsumptio mixta; on the contrary, which of any two presumptions ought to take precedence must be determined by the nature of each. The presumption of innocence, for in-

(*a*) *Brady* v. *Cubitt*, 1 Dongl. 31, 39, per L. Mansfield; *Jayne* v. *Price*, 5 Taunt. 326, 328, per Heath, J.; *R.* v. *The Inhabitants of Harborne*, 2 A. & E. 540; *Rickards* v. *Mumford*, 2 Phillim. 24, 25, per Sir John Nicholl; *Doe* d. *Harrison* v. *Hampson*, 4 C. B. 267; *Simpson* v. *Dendy*, 8 C. B., N. S. 433; Menochius de Præs. lib. 1, quæst. 29, 30, 31; Mascardus de Prob. Concl. 1231.

(*b*) *Bryant* v. *Foot*, L. Rep., 2 Q. B. 161; *S. C.* (in Cam. Scac.) 3 *Id.* 497.

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stance, is præsumptio juris; but every day's practice shews that it may be successfully encountered, by the presumption of guilt arising from the recent possession of stolen property (*c*)—which is at most only præsumptio mixta.

Rules respecting.

§ 330. The subject of conflicting presumptions seems almost to have escaped the notice of the writers on English law: but several rules respecting it have been laid down by civilians. Some of these are, perhaps, questionable (*d*); but the following appear sound in principle; and, provided they are understood as merely rules for general guidance, and not as of universal obligation, they are likely to be serviceable in practice.

Rule 1. Special presumptions take precedence of general ones.

§ 331. I. *Special presumptions take precedence of general ones* (*e*). This is the chief rule; and seems a branch of the more general principle, "In toto jure

(*c*) *Suprà*, bk. 2, pt. 2.

(*d*) In addition to those mentioned in this chapter, Menochius gives the following (De Præsumptionibus, lib. 1, quæst. 29. See also *Id.*, De Arbitrariis Judicum, lib. 2, casus 472):—"1. Præsumptio quæ à substantiâ provenit, dicitur potentior illâ quæ descendit à solemnitate. 2. Præsumptio judicatur potentior quæ est benignior. 3. Præsumptio judicatur firmior et potentior quæ juri communi inhæret, et illa debilior quæ juri speciali. 4. Præsumptio est validior et potentior quæ verisimilitudini magis convenit. 5. Præsumptio quæ descendit à quasi possessione est potentior illâ, quæ est, quod quælibet res præsumatur libera. 6. Præsumptio est potentior et firmior quæ est negativa, illâ quæ est affirmativa. 7. Præsumptio illa judicatur potentior et firmior quæ est fundata in ratione naturali, illâ quæ est fundata in ratione civili. 8. Firmior et validior existimatur illa præsumptio quâ absurda et inæqualia evitantur. 9. Præsumptio quæ ducitur à facto, est firmior et potentior eâ quæ sumitur à non facto. 10. Præsumptio quæ favet animæ, sicque saluti æternæ, potentior et firmior est illâ quâ dicimus delictum non præsumi."

(*e*) Menochius de Præsumptionibus, lib. 1, quæst. 29, NN. 7 & 8; *Id.* De Arbitrariis Judicum, lib. 2, casus 472, N. 14 *et seq.*; Huberus, Præl. Juris Civilis, lib. 22, tit. 3, N. 17; *Id.* Positiones Juris sec. Pand. lib. 22, tit. 3, N. 24; Mascardus de Probationibus, Concl. 1231, NN. 6 & 7; 2 Ev. Pothier, 332.

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generi per speciem derogatur"(*f*). It rests on the obvious principle that, as all general inferences (except, of course, such as are juris et de jure) are rebuttable by direct proof, they will naturally be affected by that which comes nearest to it; namely, specific proximate facts or circumstances, which give rise to special inferences, negativing the applicability of the general presumption to the particular case. Thus, although the owner in fee of land is presumed to be entitled to the minerals found under it (*g*), the presumption may be rebutted by that arising from non-enjoyment by him, and the use of those minerals by others (*h*). So, although the possession of land and the perception of rent is primâ facie evidence of a seisin in fee, still, where the demandant in a writ of right claimed under a remote ancestor, it was held that the presumption was successfully encountered by proof that the demandant and his father, through whom his title was traced, had for a long time allowed other parties to keep possession of the land, when they themselves lived in the neighbourhood and must have been aware of it (*i*). The flowing of the tide is presumptive evidence of a navigable river (*j*); but the presumption may be removed by proof of the narrowness of the stream, or the shallowness of its channel, or of acts of ownership by private individuals, inconsistent with a right of public navigation (*k*). The presumption of innocence is a very general, and rather favoured presumption; but guilt, as we see every day, may be proved by presumptive evidence. Where the publication of a libel has been proved, malice will be presumed (*l*): as it will also on a charge of murder,

(*f*) Dig. lib. 50, tit. 17, l. 80. See also Sext. Decretal. lib. 5, tit. 12, de Reg. Juris, Reg. 34.

(*g*) *Rowbotham* v. *Wilson*, 8 H. L. C. 348.

(*h*) *Rowe* v. *Brenton*, 8 B. & C. 737; *Rowe* v. *Grenfel*, R. & M. 396.

(*i*) *Jayne* v. *Price*, 5 Taunt. 326.

(*j*) *Miles* v. *Rose*, 5 Taunt. 705.

(*k*) *Id.*; *R.* v. *Montague*, 4 B. & C. 598; *Mayor of Lynn* v. *Turner*, Cowp. 86.

(*l*) *Haire* v. *Wilson*, 9 B. & C. 643.

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from the fact of slaying (*m*). So, a libel sold by a servant in the discharge of his ordinary duty is presumptive, and at least since the 6 & 7 Vict. c. 96, s. 7, only presumptive, evidence of a publication by the master (*n*). And it is said to have been a rule in the ecclesiastical courts, that, where the existence of an adulterous intercourse had been proved, its continuance would be presumed so long as the parties lived under the same roof (*o*). So, although a fine, without any deed executed to declare the uses, was presumed to have been levied to secure the title of the conusor, evidence was receivable to rebut the presumption, and to shew that it was to vest the land in the conusee (*p*). It is not however every circumstance or special inference that will suffice to set aside a general presumption, either of law or fact.

Rule 2. Presumptions derived from the course of nature are stronger than casual presumptions.

§ 332. II. *Presumptions derived from the course of nature are stronger than casual presumptions* (*q*). This is a very important rule, derived from the constancy and uniformity observable in the works of nature, which render it probable that human testimonies or particular circumstances which point to a conclusion at variance with her laws, are, in the particular instance, fallacious. "Naturæ vis maxima" (*r*). Thus, on an indictment for stealing a log of timber, it would probably be considered a sufficient answer to any chain of presumptive evidence, or even to the positive testimony of an alleged eye-witness, to shew that the log in question was so large and heavy that ten of the strongest men could not

(*m*) Foster's C. L. 255, 290; 1 Hale, P. C. 455; 1 East, P. C. 340.

(*n*) *R.* v. *Walter*, 3 Esp. 21; *R.* v. *Gutch*, 1 Mood. & M. 437.

(*o*) *Turton* v. *Turton*, 3 Hagg. N. C. 350.

(*p*) *Roe* v. *Popham*, 1 Dougl. 25; Peake's Ev. 119, 5th Ed.

(*q*) Menochius de Præs. lib. 1, quæst. 29, N. 9; *Id.* de Arbitrariis Judicum, lib. 2, casus 472, N. 19; Mascardus de Probat. quæst. 10, N. 18; and Concl. 1231, NN. 17 & 18; Huberus, Præl. Jur. Civ. lib. 22, tit. 3, N. 17; *Id.* Positiones Juris sec. Pand. lib. 22, tit. 3, N. 24.

(*r*) 2 Inst. 564; Plowd. 309.

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move it (*s*). A charge of robbery brought by a strong person against a girl or a child, or of rape brought by an athletic female against an old or sickly man, would be refuted in this way. So, although this likewise rests in some degree on principles of public policy (*t*), sanity is always presumed, even when the accused is on his trial on a capital charge (*u*). Under this head come also those instances, in which presumptions drawn from the natural feelings of the human heart have been found to prevail over others, and, among the rest, over that arising from possession, as in the judgment of Solomon, already mentioned (*v*). So, where a parent advances money to a child, it is supposed to be by way of gift and not by way of loan (*x*); and the harsh doctrine of collateral warranty rested, in some degree, on a strained application of this principle (*y*).

Rule 3. Presumptions are favoured which give validity to acts.

§ 333. III. *Presumptions are favoured which give validity to acts* (*z*). The maxim, "omnia præsumuntur ritè esse acta," will be considered in its place (*a*); and it will only be necessary, at present, to advert to some cases in which this presumption has been held to override others also of a favoured kind, as for instance that of innocence. On an indictment for the murder of a constable, the fact of the deceased having publicly acted as constable is sufficient primâ facie proof of his having

(*s*) Menochius de Arbitrariis Jud. lib. 2, casus 472, N. 21.

(*t*) *Infrà*, sect. 3, sub-sect. 1.

(*u*) Answer of the Judges to the House of Lords, 8 Scott, N. R. 595; 1 Car. & K. 131; *R.* v. *Stokes*, 3 Car. & K. 185.

(*v*) 1 Kings, iii. 16; *suprà*, sub-sect. 2.

(*x*) Dig. lib. 10, tit. 2, l. 50; Voet. ad Pand. lib. 22, tit. 3, N. 15, vers. fin.; per Bayley, J., in *Hick* v. *Keats*, 4 B. & C. 69, 71.

(*y*) Co. Litt. 373 a.

(*z*) Huberus, Præl. Jur. Civ. lib. 22, tit. 3, N. 17; *Id.* Positiones Juris sec. Pand. lib. 22, tit. 3, N. 24; Menochius de Præs. lib. 1, quæst. 29, N. 3; *Id.* de Arbitrar. Jud. lib. 2, cas. 472, N. 2; Mascardus de Prob. Concl. 1231, NN. 20 & 23.

(*a*) *Infrà*, sect. 2, sub-sect. 4.

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been such, without producing his appointment (*b*). And on an indictment for perjury in taking a false oath before a surrogate, it is sufficient, primâ facie, to prove that the party administering the oath acted as surrogate (*c*), &c.

Rule 4. The presumption of innocence is favoured in law.

§ 334. IV. *The presumption of innocence is favoured in law* (*d*). This is a well known rule, and runs through the whole criminal law; but it likewise holds in civil proceedings. In *R.* v. *The Inhabitants of Twyning* (*e*), which is certainly one of the leading authorities on the subject of conflicting presumptions, it appeared by a case sent up from the sessions, that about seven years before that time, a female pauper intermarried with Richard Winter, with whom she lived a few months, when he enlisted as a soldier, went abroad on foreign service, and was never afterwards heard of. In little more than twelve months after his departure, she married Francis Burns. On this evidence the Court of Queen's Bench, consisting of Bayley and Best, JJ., held that the issue of the second marriage ought to be presumed legitimate; and the former judge observes, pp. 388-9, "This is a case of conflicting presumptions, and the question is, which is to prevail. The law presumes the continuation of life, but it also presumes against the commission of crimes, and that even in civil cases, until the contrary be proved. * * * The facts of this case are, that there is a marriage of the pauper with Francis Burns, which is primâ facie valid; but the year before that took place, she was the wife of

(*b*) *R.* v. *Gordon*, 1 Leach, C. L. 515.

(*c*) *R.* v. *Verelst*, 3 Camp. 432.

(*d*) Huberus, Præl. Jur. Civ. lib. 22. tit. 3, N. 17; *Id.* Positiones Juris sec. Pand. lib. 22, tit. 3, N. 24; Menochius de Præs. lib. 1, quæst. 29, N. 11; *Id.* de Arbitr. Jud. lib. 2, cas. 472, N. 25; Mascard. de Prob. Concl. 1231, NN. 9, 30, &c.; *R.* v. *The Inhabitants of Twyning*, 2 B. & Ald. 386; *Middleton* v. *Barned*, 4 Exch. 241.

(*e*) 2 B. & Ald. 386.

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Richard Winter, and if he was alive at the time of the second marriage, it was illegal, and she was guilty of bigamy. But are we to presume that Winter was then alive? If the pauper had been indicted for bigamy, it would clearly not be sufficient. In that case Winter must have been proved to have been alive at the time of the second marriage. It is contended that his death ought to have been proved; but the answer is, that the presumption of law is, that he was not alive when the consequence of his being so is, that another person has committed a criminal act. I think, therefore, that the sessions decided right in holding the second marriage to have been valid, unless proof had been given that the first husband was alive at the time." This language goes much farther than was necessary for the decision of the actual case before the court, and certainly cannot be supported to its full extent, as appears from the subsequent case of *R.* v. *The Inhabitants of Harborne* (*f*). There, in order to support an order for the removal of a female pauper, of the name of Ann Smith, it was proved that on the 11th April, 1831, she had been married to one Henry Smith, who had since deserted her; in answer to which it was shewn that he had been previously married in October, 1821, to another female, with whom he lived until 1825, when he left her; that several letters had since been received from her from Van Diemen's Land, one of which was produced, bearing date twenty-five days previous to the second marriage. The sessions on this evidence presumed the first wife to be living at the time of the second marriage, and quashed the order. On the case coming on for argument before the Court of Queen's Bench, several cases were cited, and *R.* v. *Twyning* was relied on as an authority to shew that the party asserting the life of the first wife, and thereby the criminality of the husband, was bound to shew the continuance of the

(*f*) 2 A. & E. 540.

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life up to the very moment of the second marriage; and that the court was precluded from inferring the life's continuance until the marriage, by the strict rule of legal presumption laid down in that case. The court, however; consisting of Lord Denman, C. J., Littledale and Williams, JJ.,; held that the conclusion drawn by the sessions from the evidence was proper. Lord Denman, in the course of his judgment, expresses himself as follows: "The only circumstance raising any doubt in my mind, is the doctrine laid down by Bayley, J., in *R.* v. *Twyning*. But in that case, the sessions found that the plaintiff was dead; and this court merely decided, that the case raised no presumption upon which the finding of the sessions could be disturbed. The two learned judges, Bayley, J., and Best, J., certainly appear to have decided the case upon more general grounds; the principle, however, on which they seem to have proceeded, was not necessary to that decision. I must take this opportunity of saying, that nothing can be more absurd than the notion, that there is to be any rigid presumption of law on such questions of fact, without reference to accompanying circumstances, such, for instance, as the age or health of the party. There can be no such strict presumption of law. * * * * I am aware that Bayley, J., founds his decision on the ground of contrary presumptions; but I think that the only questions in such cases are, what evidence is admissible, and what inference may fairly be drawn from it. It may be said, suppose a party were shewn to be alive within a few hours of the second marriage, is there no presumption then? The presumption of innocence cannot shut out such a presumption as that supposed. I think no one, under such circumstances, could presume that the party was not alive at the time of the second marriage." Judgments to a similar effect were given by the other members of the court. There is no conflict whatever between the

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decisions in the cases of *R.* v. *The Inhabitants of Twyning*, and *R.* v. *The Inhabitants of Harborne*, nor does the principle involved in either of them present any real difficulty. The presumption of innocence is a præsumptio juris, and as such good until disproved. *R.* v. *Twyning* decides that the presumption of fact of the continuance of life, derived from the first husband's having been shewn to be alive about a year previous to the second marriage, ought not to outweigh the former presumption in the estimation of the sessions or a jury; while *R.* v. *Harborne* determines, that if the period be reduced from twelve months to twenty-five days it would be otherwise, and that the sessions or a jury might, in their discretion, presume the first husband to be still living. This view of these cases is confirmed by the judgment of the House of Lords, in the subsequent case of *Lapsley* v. *Grierson* (*g*).

Section II.

PRESUMPTIONS OF LAW AND FACT USUALLY MET IN PRACTICE.

Design of this section.

§ 335. It is proposed in this section to consider the principal presumptions of law and fact usually met with in practice, and which will be treated in the following order:—

1. Presumption against ignorance of the law.
2. Presumptions derived from the course of nature.
3. Presumptions against misconduct.
4. Presumptions in favour of the validity of acts.
5. Presumptions from possession and user.
6. Presumptions from the ordinary conduct of mankind, the habits of society, and the usages of trade.

(*g*) 1 Ho. Lo. Cas. 498.

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7. Presumption of the continuance of things in the state in which they have once existed.
8. Presumptions in disfavour of a spoliator.
9. Presumptions in international law.
10. Presumptions in maritime law.
11. Miscellaneous presumptions.

Sub-Section I.

PRESUMPTION AGAINST IGNORANCE OF THE LAW.

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Presumption against ignorance of the law.

Generally.

§ 336. The law presumes *conclusively* against ignorance of its provisions. It is a *præsumptio juris et de jure*, that all persons subject to any law which has been duly promulgated, or which derives its efficacy from general or immemorial custom, must, for the reasons stated in the Introduction to this work (*h*), be supposed to be acquainted with its provisions, so far as to render them amenable to punishment for their violation, and to have done all acts with a knowledge of their legal effects and consequences (*i*)—"Ignorantia juris, quod quisque tenetur scire, non excusat" (*k*).

Courts of justice.

§ 337. Courts of justice are also presumed to know the law, but in a different sense. Private individuals are only taken to know it sufficiently for their personal guidance; but tribunals are to be deemed acquainted

(*h*) Part 2, § 45.

(*i*) Dr. & Stud. Dial. 1, c. 26; Dial. 2, cc. 16, 46; Plowd. 342-3; 1 Co. 177 b; 2 Co. 3 b; 6 Co. 54 a; 2 Dougl. 471; 2 East, 472; 3 M. & Selw. 378.

(*k*) 4 Blackst. Comm. 27.

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with it so as to be able to administer justice when called on (*l*); for which reason it is not necessary, in pleading, to state matter of law (*m*). The Sovereign is also presumed to be acquainted with the law—"Præsumitur rex habere omnia jura in scrinio pectoris sui" (*n*): still it is competent in certain cases, to shew that grants from the crown have been made under a mistake of the law (*o*). The Sovereign.

Sub-Section II.

PRESUMPTIONS DERIVED FROM THE COURSE OF NATURE.

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§ 338. Presumptions derived from the course of nature have been already noticed as in general entitled to more weight than such presumptions as arise casually (*p*), —"Naturæ vis maxima" (*q*),—and they may be divided into physical and moral. As instances of the first, the Presumptions derived from the course of nature. Physical.

(*l*) See the judgment of Maule, J., in *Martindale* v. *Falkner*, 2 C. B. 719-20; and the argument of the Att.-Gen. in *Stockdale* v. *Hansard*, 9 A. & E. 1, 131.

(*m*) Steph. Plead. 383, 5th Ed.; 1 Chit. Plead. 216, 6th Ed.

(*n*) Co. Litt. 99 a.

(*o*) Plowd. 502; 2 Blackst. Comm. 348; *R.* v. *Clarke*, 1 Freem. 172. See *Legat's case*, 10 Co. 109.

(*p*) *Suprà*, sect. 1, sub-sect. 3, § 334.

(*q*) 2 Inst. 564; Plowd. 309.

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law notices the course of the heavenly bodies, the changes of the seasons, and other physical phenomena, according to the maxim—"lex spectat naturæ ordinem" (*r*). "If," says Littleton (*s*), "the tenant holds of his lord by a rose, or by a bushel of roses, to pay at the feast of St. John the Baptist; if such tenant dieth in winter, then the lord cannot distrain for his relief, until the time that roses by the course of the year may have their growth." So the law presumes all individuals to be possessed of the usual powers and faculties of the human race; such as common understanding, the power of procreation within the usual ages (*t*), &c.; for which reason idiocy, lunacy, &c., are never presumed. And the usual incapacities of infancy are not overlooked. It is a *præsumptio juris et de jure* that children under the age of seven years are incapable of committing felony (*u*); that males under fourteen are incapable of sexual intercourse (*x*); and that males under fourteen years, and females under twelve, cannot consent to marriage (*y*). So, between the ages of seven and fourteen, an infant is presumed incapable of committing felony; but this is only *præsumptio juris*; and a malicious discretion in the accused may be proved, in which case it is said "malitia supplet ætatem" (*z*).

(*r*) Co. Litt. 92 a, 197 b.

(*s*) Sect. 129.

(*t*) Huberus, Præl. Jur. Civ. lib. 22, tit. 3, n. 17. In the case of gifts in tail, the tenant is presumed never too old to be capable of having issue to inherit by force of the gift. Phill. & Am. Ev. 462. See also *Reynolds* v. *Reynolds*, 1 Dick. 374, and *Leng* v. *Hodges*, 1 Jac. 585. Several instances are given in Beck's Med. Jurisp. 148, 7th Ed., of females having borne children above the ages of fifty, and even sixty, years; and see the celebrated *Douglas cause*, given by him at page 402. Under the feudal system, if a guardian in chivalry married the heir to a woman past the age of child-bearing, it was deemed by law a disparagement. Litt. sect. 109; Co. Litt. 80 b.

(*u*) 1 Hale, P. C. 27; 4 Blackst. Comm. 23.

(*x*) 1 Hale, P. C. 630; *R.* v. *Phillips*, 8 C. & P. 736; *R.* v. *Jordan*, 9 *Id.* 118; *R.* v. *Brimilow*, *Id.* 336; *R.* v. *Groombridge*, 7 C. & P. 582.

(*y*) 1 Blackst. Comm. 436.

(*z*) 1 Hale, P. C. 26; 4 Blackst. Comm. 23.

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Gestation of the human fœtus.

§ 339. Under this head come the important and difficult questions of the maximum and minimum term of gestation of the human fœtus—questions replete with importance and delicacy, and an erroneous decision on which may not only compromise the rights of individuals, but destroy female honour, and jeopardize the peace of families. These are medico-legal subjects, on which, where we are not tied up by any positive rule of law, the opinions of physiologists and physicians must necessarily have great weight. As to the *maximum* term of gestation—according to Sir Edward Coke, the "legitimum tempus appointed by law *at the furthest* is nine months, or forty weeks;" for which he cites an old case of Robert Radwell, in the reign of Edward I. (*a*), and endeavours to fortify his position by a passage from the Book of Esdras (*b*). But this doctrine is not clear even upon the ancient authorities (*c*), while it is denied by the modern (*d*), and is contrary to experience. According to many eminent authorities, the usual period of gestation is nine *calendar* months (*e*); but others fix it at ten *lunar* months, being 280 days, or nine *calendar* months and *about* a week over (*f*). Another says that "according to the testimony of experienced accoucheurs, the average duration of gestation in the human female, is comprised between the thirty-eighth and fortieth weeks after conception" (*g*). It is, however, conceded

Maximum term of.

(*a*) Co. Litt. 123 b.

(*b*) 2 Esdras, iv. 40, 41. "Go thy way to a woman with child, and ask of her, when she hath fulfilled her nine months, if her womb may keep the birth any longer within her. Then said I, 'No, Lord, that can she not.'"

(*c*) See them collected and ably commented on by Mr. Hargrave, in his edition of Co. Litt. 123 b, n. (2).

(*d*) Runnington on Ejectment, 383 *et seq.*

(*e*) Harg. Co. Litt. 123 b, n. (2); Chitty's Med. Jurisp. 405.

(*f*) Beck's Med. Jurisp. 356, 7th Ed.; who remarks that it is very important to recollect the distinction between *lunar* and *calendar* months. Nine *calendar* months may be from 273 days to 275 days, but ten *lunar* months are 280 days.

(*g*) Tayl. Med. Jurisp. 606—7, 7th Ed.

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on all hands that a delay or difference in the time may take place, of a few days, or perhaps even weeks; as there are numerous causes, both physical and moral, by which delivery may be accelerated or retarded. But whether the laws of nature admit of such a phenomenon, as the protraction of the term of gestation for a considerable number of weeks or months beyond the accustomed period, is an unsettled point (*h*). It is incontestable that there are to be found on record a great many cases, true or false, of gestation protracted considerably beyond the usual time. There are old instances of children declared legitimate by foreign tribunals after a gestation, real or alleged, of ten, eleven, twelve, thirteen, and fourteen months, and even longer (*i*). Upon the whole we may fairly conclude that, admitting the possibility of gestation being protracted in the sense in which the word is here used, the *genuine* cases of it are rare (*k*). It is, perhaps, hardly necessary to observe that, in all investigations of this nature, the character and conduct of the mother are elements of the highest importance to be taken into consideration, as also are the characters of the deposing witnesses, and the motives to falsehood or fabrication which may exist on either side.

Minimum term of.

§ 340. With respect to the *minimum* term of gestation—it seems now conceded that, as a general rule, no infant can be born capable of living until 150 days,

(*h*) Beck's Med. Jurisp. chap. 9, 7th Ed.; Chitty, Med. Jurisp. 405, 406; Tayl. Med. Jurisp. 525, c. 54, 7th Ed.

(*i*) See a large number collected in Beck's Med. Jurisp. 362—76, 7th Ed., as well as in other authors who have written on the subject.

(*k*) It is difficult to withhold assent from the following observations of a French writer:—"If we admit all the facts reported by ancient and modern authors, of delivery from eleven to twenty-three months, it will be very commodious for females; and if so great a latitude is allowed for the production of posthumous heirs, the collateral ones may in all cases abandon their hopes unless sterility be actually present." (Louis, Mémoire contre Légitimité des Naissances prétendues tardives, as cited in Beck's Med. Jurisp. 366, 7th Ed.)

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or five months, after conception (*l*). There are, it is true, some old cases recorded to the contrary (*m*), but they have been doubted (*n*). It seems also conceded that children born before seven months are very unlikely to live, and that even at seven months the chance is against the child (*o*).

Moral.

§ 341. We now proceed to the consideration of presumptions of this kind derived from observation of the *moral* world. Many of these are founded on the feelings and emotions natural to the human heart, of which we have already seen an instance in the celebrated judgment of Solomon (*p*). Following out this principle, it is held that natural love and affection form a *good* consideration, sufficient to support all instruments where a *valuable* consideration is not expressly required by law (*q*); that money advanced by a parent to his child is intended as a gift, not as a loan (*r*); &c. And it is a maxim of law "Nemo præsumitur alienam posteritatem suæ prætulisse" (*s*).

From feelings and emotions of the human heart.

Presumption from transferring money.

§ 342. The civil law laid down as a maxim, "Qui solvit, nunquam ita resupinus est, ut facile suas pecunias jactet, et indebitas effundat" (*t*): and in the common law, the fact of transferring money to another person is

(*l*) Beck's Med. Jurisp. 210, 7th Ed.

(*m*) *Id.*, and Chitty's Med. Jurisp. 406.

(*n*) Beck, Med. Jurisp. 210, 7th Ed.

(*o*) *Id.* 212; Tayl. Med. Jurisp. 615 *et seq.*, 7th Ed.

(*p*) 1 Kings, iii. 16.

(*q*) 2 Blackst. Com. 297; Dy. 374, pl. 17; Plowd. 306, 309; Finch, Law, 25.

(*r*) *Hick* v. *Keats*, 4 B. & C 69, 71, per Bayley, J. "Quæ pater filio emancipato studiorum causâ peregre agenti subministravit, si non credendi animo pater misisse fuerit comprobatus, sed pietate debitâ ductus, in rationem portionis, quæ ex defuncti bonis, ad eundem filium pertinuit, computare æquitas non patitur." Dig. lib. 10, tit. 2, l. 50. See also Mascard. de Prob. Concl. 76.

(*s*) Co. Litt. 373 a; Wing. Max. 285.

(*t*) Dig. lib. 22, tit. 3, l. 25. See also Voet. ad Pand. lib. 22, tit. 3, N. 15.

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presumptive evidence of payment of an antecedent debt, and not of a gift or loan (*u*). "Non præsumitur donatio" (*v*).

Presumption of benefit.
Presumption of willingness to accept a benefit.

§ 343. It was said by Abbott, C. J., in the case of *Townson* v. *Tickell* (*x*), that, "primâ facie, every estate, whether given by will or otherwise, is supposed to be beneficial to the party to whom it is given:" and presumptions are sometimes founded on the assumption, that a person must be taken to be willing to receive a benefit (*y*). Thus, in *Thompson* v. *Leach* (*z*), it was held that a surrender immediately divests the estate out of the surrenderor, and vests it in the surrenderee, whose consent to the act is implied; for, says the book, "a gift imports a benefit, and an assumpsit to take a benefit may well be presumed; and there is the same reason why a surrender should vest the estate before notice or agreement, as why a grant of goods should vest a property, or sealing of a bond to another in his absence should be the obligee's bond immediately before notice." In *Smyth* v. *Wheeler* (*a*), where a lease was assigned to B. and C. on certain trusts, Hale, C. J., said, "This assignment, being of a chattel, is in both the assignees till the disagreement of B., and then is wholly in C." So it is said that mutual benefit is evidence of an agreement; as suppose two men front a river, and each of them has land between them and the river, and they cut through each other's ground for water, and that continues twenty years, in such a case an agreement may be presumed (*b*).

(*u*) *Welch* v. *Seaborn*, 1 Stark. 474; *Cary* v. *Gerish*, 4 Esp. 9; *Aubert* v. *Walsh*, 4 Taunt. 293; *Breton* v. *Cope*, 1 Peake, 31.

(*v*) Matth. de Prob. cap. 2, N. 10.

(*x*) 3 B. & A. 31, 36.

(*y*) *Thompson* v. *Leach*, 2 Salk. 618; also reported 3 Lev. 284; 2 Ventr. 198; *Thomas* v. *Cook*, 2 B. & Ald. 119, 121. See Burton, Real Prop. 67, 8th Ed.

(*z*) 2 Salk. 618; also reported 3 Lev. 284; 2 Ventr. 198.

(*a*) 2 Keb. 774.

(*b*) Vin. Abr. Ev. Q. A. pl. 8.

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§ 344. It is also a maxim running through the whole law, that every person must be taken to intend the natural consequences of his acts (*c*). The principal applications of this are to be found in criminal cases, as will be shewn in a subsequent part of this chapter (*d*).

Presumption that a person intends the natural consequences of his acts.

Sub-Section III.

PRESUMPTIONS AGAINST MISCONDUCT.

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§ 345. We next proceed to consider the presumptions which the law makes against misconduct.

Presumptions against misconduct.

§ 346. First, then, it is a præsumptio juris, running through the whole law of England, that no person shall, in the absence of criminative proof, be supposed to have committed any violation of the criminal law,—whether malum in se or malum prohibitum (*e*),—or to have done any act subjecting him to any species of punishment, such, for instance, as a contempt of court (*f*); or in-

1. Presumption against illegality.

(*c*) 2 Stark. Ev. 572, 3rd Ed.; 1 Greenl. Ev. § 18, 7th Ed.

(*d*) *Infrà*, sect. 3, snb-sect. 1.

(*e*) Phil. & Am. Ev. 464; 2 Ev. Poth. 332.

(*f*) *Scholes* v. *Hilton*, 10 M. & W. 15, 17.

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volving a penalty, such as loss of dower (*g*), &c. And this presumption is not confined to proceedings instituted for the purpose of punishing the supposed offence, or of dealing with the supposed conduct; but holds in all proceedings for whatever purpose originated, and whether the guilt of the party comes in question directly or collaterally (*h*). It is therefore a settled rule in criminal cases, that the accused must be presumed innocent until proved to be guilty, and consequently that the onus of proving everything essential to the establishmeut of the charge against him lies on the prosecutor—a maxim founded on the most obvious principles of justice and policy (*i*). It is, however, in general sufficient to prove a primâ facie case; for, as has been well remarked, "imperfect proofs, from which the accused might clear himself, and does not, become perfect" (*j*). "In drawing an inference or conclusion from facts proved, regard must always be had to the nature of the particular case, and the facility that appears to be afforded, either of explanation or contradiction. No person is to be required to explain or contradict, until enough has been proved to warrant a reasonable and just conclusion against him, in the absence of explanation or contradiction" (*k*). Undoubtedly,

(*g*) *Sidney* v. *Sidney*, 3 P.Wms. 276; *Watkins* v. *Watkins*, 2 Atk. 96; *Clarke* v. *Periam*, *Id.* 333.

(*h*) *Williams* v. *The East India Company*, 3 East, 192; *R.* v. *The Inhabitants of Twyning*, 2 B. & A. 386; *R.* v. *The Inhabitants of Harborne*, 2 A. & E. 540; *Lapsley* v. *Grierson*, 1 Ho. Lo. Cas. 498; *Rodwell* v. *Redge*, 1 C. & P. 220; *Ross* v. *Hunter*, 4 T. R. 33, 38, per Buller, J.; *Leete* v. *The Gresham Life Insurance Society*, 15 Jurist, 1161, 1162, per Platt, B.

(*i*) Introd. pt. 2, § 49. It is related that on one occasion, when the Emperor Julian was sitting to administer justice, a prosecutor, seeing his cause abont to fail for want of proof, exclaimed, "Ecquis, florentissime Cæsar, nocens esse poterit usquam, si negare suffecerit?" To which the emperor readily rejoined, "Ecquis innocens esse poterit, si accusasse sufficiet." Ammianus Marcellinus, lib. 18, c. 1.

(*j*) Beccaria, Dei Delitti et delle Pene, § 7.

(*k*) Per Abbott, C. J., in *R.* v. *Burdett*, 4 B. & A. 95, 161-2. See

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the more serious or improbable the charge the stronger must be the primâ facie proof; and additional caution is required when the offence is of very ancient date, for in such cases the means of defence, particularly by proof of an alibi—when true, the most complete of all answers—are greatly diminished (*l*). Although in point of law "Nullum tempus occurrit regi," yet as matter of practice, "Accusator post rationabile tempus non est audiendus, nisi bene de se omissionem excusaverit" (*m*). And the presumption in favour of innocence will not be made, when a stronger presumption is raised against it by evidence or otherwise (*n*).

Construction of ambiguous instruments and acts.

§ 347. It is a branch of this rule, that ambiguous instruments or acts shall, if possible, be construed so as to have a lawful meaning (*o*). Thus, where a deed or other instrument is susceptible of two constructions, one of which the law would carry into effect, while the other would be in contravention of some legal principle or statutory provision, the parties will always be presumed to have intended the former. "In facto quod se habet ad bonum et malum, magis de bono, quàm de malo, lex intendit" (*p*). Thus, where tenant in tail makes a lease for life, without saying for whose life, it shall be understood that he meant his own, as that is an estate he may lawfully create: whereas, if he meant it

also per Lord Mansfield, in *Blatch* v. *Archer*, Cowp. 63, 65.

(*l*) Wills, Circ. Ev. 148, 3rd Ed. There are several instances of successful prosecution after the lapse of very long time from the commission of the offence. See, in particular, the case of W. A. Horne, who was tried and executed in 1759, for the murder of his child in 1724 (2 Annual Reg. 368); also, that of Joseph Wall, Governor of Goree, who was executed in 1802 for a murder committed in 1782 (28 Ho. St. Tr. 51). In the celebrated case of Eugene Aram, also, there was an interval of about fourteen years between the murder and the trial. (2 Annual Reg. 351.)

(*m*) Moore, 817.

(*n*) See *suprà*, sect. 1, subsect. 3.

(*o*) Co. Litt. 42 a & b; Finch, Law, 57.

(*p*) Co. Litt. 78 b.

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for the life of any one else, he would exceed his power, and previous to the 3 & 4 Will. 4, c. 27, s. 39, would have worked a discontinuance (*q*). So, where A., who had commenced an action against B. to recover a sum of money, agreed with C. to suspend the proceedings on payment of a specified sum and the delivery of several promissory notes, C. undertaking,—in the event of any of the notes being dishonoured, and A. issuing a capias or detainer against B.,—either to surrender him to custody, or pay the money due on the notes; it was held that the contract was legal, and must be understood to mean that C. was to procure the surrender of B. by *lawful* means, as by his consent, and not by any attempt to take him forcibly into custody (*r*).

2. Presumption of the discharge of duty.

§ 348. 2. All persons are presumed to have duly discharged any obligation imposed on them either by unwritten or written law. Thus, the judgment of courts of competent jurisdiction are presumed to be well founded (*s*); and their records to be correctly made (*t*); judges and jurors are presumed to do nothing causelessly or maliciously (*u*);—"De fide judicis non recipitur quæstio" (*x*), "Quæ in curiâ regis acta sunt, ritè agi præsumuntur" (*y*);—public officers are presumed to do their duty (*z*); a parson is presumed to be always resident on his benefice (*a*); a beneficed clergyman is presumed to have read the articles of the

(*q*) Co. Litt. 42 a.

(*r*) *Lewis* v. *Davison*, 4 M. & W. 654.

(*s*) "Res judicata pro veritate accipitur." Co. Litt. 103 a; Dig. lib. 50, tit. 17, l. 207; Introd. Part 2, § 44.

(*t*) 1 Stark. Ev. 252, 3rd Ed.; *Read* v. *Jackson*, 1 East, 355; *Earl of Carnarvon* v. *Villebois*, 13 M. & W. 313.

(*u*) Anders. 47, pl. 34; *Sutton* v. *Johnstone*, 1 T. R. 493, 503; *Fray* v. *Blackburn*, 3 B. & S. 576, 578, note, and the authorities there referred to.

(*x*) Bac. Max. Reg. 17.

(*y*) 3 Bulst. 43.

(*z*) 3 Stark. Ev. 936, 3rd Ed.; *Simms* v. *Henderson*, 11 Q. B. 1015.

(*a*) Co. Litt. 78 b.

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church (*b*), and to have made the declaration required by 13 & 14 Car. 2, c. 4, relative to the uniformity of public prayers (*c*); &c. So, oral evidence is not receivable of what the accused or the witnesses said when before the committing magistrate, unless there be positive proof that what they did say was not taken down in writing (*d*); for the presumption of law is, that the directions of the statutes in that behalf were obeyed (*e*). So where goods seized for a distress are appraised and sold, according to the provisions of the 2 W. & M. c. 5, s. 2, st. 1, the sale will be presumed to have been for the best price that could be got for them (*f*); and under the repealed statute, 13 Car. 2, c. 1, s. 12, st. 2, which required all parties filling corporate offices, to take the sacrament according to the rites of the Church of England within a year next before their election, every party filling such an office was presumed to have complied with the statute (*g*), &c.

§ 349. 3. It is a principle of law nearly, if not altogether, as universal as the former, that "Odiosa et inhonesta non sunt in lege præsumenda" (*h*). In furtherance of this it is a maxim that fraud and covin are never presumed (*i*), even in third parties whose conduct only comes in question collaterally (*k*). So, the law presumes against vice and immorality: and, on this ground, presumes strongly in favour of marriage (*l*):

3. "Odiosa et inhonesta non sunt in lege præsumenda." Fraud and covin.

Vice and immorality.

Presumption of marriage.

(*b*) *Monke* v. *Butler*, 1 Rol. 83.

(*c*) *Powell* v. *Milburn*, 3 Wils. 355.

(*d*) 2 Ev. Poth. 335–6; *Phillips* v. *Wimburn*, 4 Car. & P. 273; *Parsons* v. *Brown*, 3 Car. & K. 295—6.

(*e*) See those statutes, *suprà*, bk. 1, pt. 1, § 105.

(*f*) Com. Dig. Distress, D. 8.

(*g*) *R.* v. *Hawkins*, 10 East, 211.

(*h*) 10 Co. 56 a.

(*i*) 10 Co. 56 a; Cro. El. 292, pl. 2; Cro. Jac. 451; Cro. Car. 550; *Master* v. *Miller*, 4 T. R. 320, 333, per Buller, J.

(*k*) Per Buller, J., in *Ross* v. *Hunter*, 4 T. R. 33, 38.

(*l*) *Harrison* v. *The Burgesses of Southampton*, 4 De G., M. & G. 137; *Harrod* v. *Harrod*, 1 Kay & J. 4.

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so that cohabitation and reputation are held to be presumptive evidence of marriage (*m*); except in prosecutions for bigamy, and in cases where damages are claimed for adultery under the 20 & 21 Vict. c. 85, s. 33, in each of which proceedings an actual marriage must be proved (*n*). The former of these exceptions seems to rest on the ground, that the accused has the presumption of innocence in his favour; and the latter, partly on the ground that the proceeding is in the nature of a penal one; but chiefly because it might otherwise be turned to a bad purpose, by persons giving the name and character of wife to women to whom they had not been married.

Presumption of legitimacy.

One of the strongest illustrations of this principle (although resting also in some degree on grounds of public policy) is the presumption in favour of the legitimacy of children—"Semper præsumitur pro legitimatione puerorum, et filiatio non potest probari" (*o*). Thus it is a præsumptio juris et de jure, that a child born after wedlock, of which the mother was, even visibly, pregnant at the time of the marriage, is the offspring of the husband (*p*). So every child born during wedlock, where the married parties are neither infrà nubiles annos, nor physically disqualified for sexual intercourse, is presumed legitimate (*q*); according to the maxim "pater est quem nuptiæ demonstrant,"—a presumption which holds even when the parties are living apart by mutual consent; but not when they are

(*m*) *Doe* d. *Fleming* v. *Fleming*, 4 Bing. 266; *Reed* v. *Passer*, 1 Peake, 233; *Siehel* v. *Lambert*, 15 C. B., N. S. 781, 787.

(*n*) *Morris* v. *Miller*, 4 Burr. 2057; *Birt* v. *Barlow*, 1 Dougl. 171; *Catherwood* v. *Caslon*, 13 M. & W. 261, 265. This last case is based on *R.* v. *Millis*, 10 Cl. & F. 534, as to which see the observation of Willes, J., in *R.* v. *Manwaring*, 1 Dearsl. & B. 132, 139; and also *Beamish* v. *Beamish*, 9 Ho. Lo. Cas. 274.

(*o*) 5 Co. 98 b. See also Co. Litt. 126 a.

(*p*) 1 Rol. Abr. Bastard, B.; Co. Litt. 244 a; 1 Phill. Ev. 473, Note 4, 10th Ed.

(*q*) 1 Rol. Abr. Bastard, B.

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separated by a sentence pronounced by a court of competent jurisdiction, in which case obedience to the sentence of the court will be presumed (*r*). In very ancient times this presumption of legitimacy was only præsumptio juris (*s*); but it was subsequently raised into a conclusive presumption, if the husband was within the four seas at any time during the pregnancy of the wife (*t*). In later times, however, this has been very properly relaxed; and it is now competent to negative the fact of sexual intercourse between the parties during the time when, according to the course of nature, the husband could have been the father of the child (*u*). If, however, the fact of sexual intercourse between the husband and wife within that time has been established to the satisfaction of the tribunal, the presumption cannot be rebutted by proof of adultery, as the law will not in that case allow a balance of evidence as to who was most likely to be the father of the child (*x*).

4. Presumption against wrongful or tortious conduct.

§ 350. 4. Wrongful or tortious conduct will not be presumed. "Injuria non præsumitur" (*y*); "Nullum iniquum est in jure præsumendum" (*z*). Thus, no species of ouster, such as disseisin, discontinuance, &c., will be presumed without proof, either direct or presumptive (*a*). So when a party to any forensic pro-

(*r*) *St. George's* v. *St. Margaret's*, 1 Salk. 123; *Sidney* v. *Sidney*, 3 P. Wms. 275.

(*s*) 1 Phill. Ev. 462, 10th Ed.

(*t*) Co. Litt. 244 a; *R.* v. *Alberton*, 1 L. Raym. 395—6; *R.* v. *Murrey*, 1 Salk. 122.

(*u*) *Morris* v. *Davies*, 5 Cl. & F. 163; *R.* v. *The Inhabitants of Mansfield*, 1 Q. B. 444. And see *Legge* v. *Edmunds*, 25 L. J., Ch. 125; *Plowes* v. *Bossey*, 31 *Ib.* 681; *Atchley* v. *Sprigg*, 33 *Ib.* 345.

(*x*) *Banbury Peerage case*, 1 Sim. & S. 155; *Head* v. *Head*, *Id.* 152; *Morris* v. *Davies*, 5 Cl. & F. 163; *Case of the Barony of Saye and Sele*, 1 Ho. Lo. Cas. 507; *Wright* v. *Holdgate*, 3 Car. & K. 158.

(*y*) Co. Litt. 232 b.

(*z*) 4 Co. 72 a.

(*a*) *Doe* d. *Fishar* v. *Prosser*, Cowp. 217. See Co. Litt. 42 a & b; *Peaceable* d. *Hornblower* v. *Read*, 1 East, 568; *Thomas* v. *Thomas*, 2 Kay & J. 79.

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ceeding tenders, in support of his case, a document which must be taken, primâ facie, to be the property of another, the court will presume that he did not come by it in any tortious way (*b*). And where a person who is beyond the jurisdiction of a court, has in his possession a document required by that court for the purposes of justice, it is not to be presumed that he will withhold it (*c*).

5. Presumption against irreligion.

§ 351. 5. Want of religious belief, or irreligious conduct, will not be presumed. "All the members of a Christian community being presumed to entertain the common faith, no man is supposed to disbelieve the existence and moral government of God" (*d*). "Nemo præsumitur esse immemor suæ æternæ salutis, et maximè in articulo mortis" (*e*); and "In his quæ sunt favorabiliora animæ, quamvis sunt damnosa rebus, fiat aliquando extensio statuti" (*f*). It is partly on this principle that the declarations of a person who has met a violent end, made by him when under the conviction of his impending death, are, contrary to the general principle which excludes hearsay testimony, receivable in evidence against a party charged with being the cause of the death (*g*). So, although by the Statute of Marlbridge (52 Hen. III.), c. 6, a feoffment to a relative was deemed a collusive act, intended to deprive the lord of the fee of his wardship, no will of land devisable by custom, or devise of a use, before 34 Hen. 8, c. 5, could be impeached for such collusion (*h*); &c.

6. Presumption of the truth of testimony.

§ 352. 6. All testimony given in a court of justice is presumed to be true until the contrary appears (*i*). "La

(*b*) Littleton, sect. 375—377.
(*c*) *Boyle* v. *Wiseman*, 10 Exch. 647.
(*d*) 1 Greenl. Ev. § 42, 7th Ed.
(*e*) 6 Co. 76 a.
(*f*) 10 Co. 101 b.
(*g*) *Suprà*, bk. 2, pt. 2, and *infrà*, ch. 4.
(*h*) 2 Inst. 112; 6 Co. 76 a.
(*i*) Cro. Jac. 601, pl. 26.

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ley ne veut que on donne faux evidence" (*j*). This presumption seems based on four grounds: 1. A reliance on the truth of human testimony in general (*k*); 2. That the law will not presume crime (*l*), i. e. perjury; 3. That the law will not presume wrong, i. e. an intention to injure the party whom the evidence affects; and 4. That the law will not presume irreligion (*m*), and consequently will not presume intentionally false oaths.

Sub-Section IV.

PRESUMPTIONS IN FAVOUR OF THE VALIDITY OF ACTS.

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§ 353. The important maxims, "Omnia præsumuntur ritè esse acta" (*n*); "Omnia præsumuntur solemniter esse acta" (*o*); "Omnia præsumuntur legitimè facta,

Maxims—"Omnia præsumuntur ritè esse acta," &c.

(*j*) Per Grevil, M. 20 H. VII., 11 B. pl. 21.
(*k*) Introd. pt. 1, §§ 15 *et seq.*
(*l*) *Ante*, § 346.
(*m*) *Ante*, § 351.
(*n*) 2 Ev. Poth. 335; 1 Phill. Ev. 480, 10th Ed.; 3 B. & C. 327; 7 *Id.* 790; 18 C. B. 45; 6 E. & B. 973; 13 C. B., N. S. 639.
(*o*) 12 Co. 4 & 5.

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donec probetur in contrarium"(*p*), &c., must not be understood as of universal application (*q*). The extent to which presumptions will be made in support of acts, depends very much on whether they are favoured or not by law, and also on the nature of the fact required to be presumed. The true principle intended to be conveyed by the rule, "Omnia præsumuntur ritè esse acta," and the other expressions just quoted, seems to be, that there is a general disposition in courts of justice to uphold official, judicial, and other acts, rather than to render them inoperative; and with this view, where there is general evidence of acts having been legally and regularly done, to dispense with proof of circumstances, strictly speaking essential to the validity of those acts, and by which they were probably accompanied in most instances, although in others the assumption rests solely on grounds of public policy.

General view of the subject.

§ 354. Taking a general view of the subject, the acts or things thus presumed are divisible into three classes.

1. Priora à posterioribus.

1. Where from the existence of posterior acts in a supposed chain of events, the existence of *prior* acts in the chain is inferred or assumed,—priora præsumuntur à posterioribus (*r*),—as where a prescriptive right or a grant

2. Posteriora à prioribus.

is inferred from modern enjoyment (*s*). 2. Where the existence of *posterior* acts is inferred from that of prior acts,—præsumuntur posteriora à prioribus (*r*),—as where the sealing and delivery of a deed purporting to be signed, sealed, and delivered, are inferred on proof of the signing

(*p*) Co. Litt. 232 b; 8 Cl. & F. 144; 10 Cl. & F. 162.

(*q*) Many of our legal maxims are expressed with too great a degree of generality: e. g. *Omnia* præsumuntur ritè esse acta; *Omnia* præsumuntur contra spoliatorem; *Omnis* innovatio *plus* novitate perturbat quam utilitate prodest; *Omnis* definitio in lege periculosa, &c. If definitions are dangerous in law, universal propositions are not less so.

(*r*) 3 Benth. Jud. Ev. 213.

(*s*) See *infrà*, sub-sect. 5.

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only (*t*). This is manifestly the reverse of the former, and, as a general rule, the presumption is much weaker (*u*).

3. Where *intermediate* proceedings are presumed,— "probatis extremis, præsumuntur media" (*x*),—as where livery of seisin is presumed on proof of a feoffment and twenty years' enjoyment under it (*y*); or where a jury are directed to presume mesne assignments (*z*). 3. Media ab extremis.

§ 355. The real nature and extent of this principle will be best understood, by the examination of decided cases in which it has been recognized and acted on by the courts, and of others where it has been held not to apply. With this view it is proposed to consider it with reference, first, to official appointments; secondly, to official acts; thirdly, to judicial acts; fourthly, to extra-judicial acts. The application of this maxim in support of possession and user, especially where there has been long and peaceable enjoyment, will, from its importance, be reserved for separate consideration (*a*). Division of the subject.

§ 356. 1. With respect to official appointments. It is a general principle, that a person's acting in a public capacity is primâ facie evidence of his having been duly authorized so to do (*b*); and even though the office be 1. Official appointments.

(*t*) *Infrà*, § 362.

(*u*) "The probative force of posterior events in regard to prior ones, is naturally much stronger than that of prior events with regard to posterior ones. In all human affairs, execution is better evidence of design than design of execution. Why?—Because human designs are so often frustrated." 3 Benth. Jud. Ev. 213, 215, 216.

(*x*) 1 Greenl. Ev. § 20, 7th Ed.; *White* v. *Foljambe*, 11 Ves. 337, 350.

(*y*) *Doe* d. *Wilkins* v. *Marquis of Cleveland*, 9 B. & C. 864; *Rees* d. *Chamberlain* v. *Lloyd*, Wightw. 123; *Isack* v. *Clarke*, 1 Ro. 132; *Doe* d. *Lewis* v. *Davies*, 2 M. & W. 503.

(*z*) *Earl* d. *Goodwin* v. *Baxter*, 2 W. Bl. 1228; *White* v. *Foljambe*, 11 Ves. 350.

(*a*) *Infrà*, sub-sect. 5.

(*b*) Ph. & Am. Ev. 452; 1 Phil. Ev. 449, 10th Ed.; *Berryman* v. *Wise*, 4 T. R. 366; *M'Gahey* v. *Alston*, 2 M. & W. 206.

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one the appointment to which must have been in writing, it is not, at least in the first instance, necessary to produce the document, or account for its non-production (*c*). There are numerous instances to be found of the application of this principle. It has been held to apply to justices of the peace (*d*), churchwardens and overseers (*e*), masters in chancery (*f*), surrogates (*g*), commissioners for taking affidavits (*h*), attornies (*i*), under-sheriffs (*j*), replevin clerks (*k*), peace officers and constables (*l*), persons in the employment of the Post Office (*m*), vestry clerks (*n*), attested soldiers under the Mutiny Act (*o*), &c.; and it has been expressly extended by statute to revenue officers (*p*). And it holds in criminal cases as well as in civil. A strong illustration is to be found in *R.* v. *Winifred* and *Thomas Gordon* (*q*), who were indicted for the murder of a constable in the execution of his office, and where the allegation in the indictment of his being constable, was held sufficiently proved by evidence that he acted and was generally known in the parish as such. Both prisoners were convicted and Thomas Gordon executed, but the female prisoner escaped on another point.

§ 357. This presumption is not restricted to appoint-

(*c*) Ph. & Am. Ev. 452—3; 1 Phill. Ev. 449, 10th Ed.

(*d*) *Berryman* v. *Wise*, 4 T. R. 366.

(*e*) *Doe* d. *Bowley* v. *Barnes*, 8 Q. B. 1037.

(*f*) *Marshall* v. *Lamb*, 5 Q. B. 115.

(*g*) *R.* v. *Verelst*, 3 Camp. 432.

(*h*) *R.* v. *James*, 1 Show. 397; *R.* v. *Howard*, 1 M. & Rob. 187.

(*i*) *Pearce* v. *Whale*, 5 B. & C. 38.

(*j*) *Doe* d. *James* v. *Brawn*, 5 B. & A. 243.

(*k*) *Faulkner* v. *Johnson*, 11 M. & W. 581.

(*l*) *R.* v. *Gordon*, Leach, C. L. 515; *Berryman* v. *Wise*, 4 T. R. 366, per Buller, J.

(*m*) *R.* v. *Rees*, 6 C. & P. 606.

(*n*) *M'Gahey* v. *Alston*, 2 M. & W. 206.

(*o*) *Wotton* v. *Gavin*, 16 Q. B. 48.

(*p*) 26 Geo. 3, c. 77, s. 12 and c. 82, s. 6; 11 Geo. 1, c. 30, s. 32; 7 & 8 Geo. 4, c. 53, s. 17; 16 & 17 Vict. c. 107, s. 307.

(*q*) Leach, C. L. 515, 4th Ed.

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ments of a strictly public nature. It has been held to apply to constables and watchmen appointed by commissioners under a local act (*r*), and to trustees empowered by act of Parliament to raise money to build a church (*s*). But it does not, at least in general, hold in the case of private individuals, or agents supposed to be acting by their authority. Thus, it does not apply to an executor or administrator (*t*), or a tithe-collector acting under the authority of a private person (*u*); &c.

§ 358. This presumption of the due appointment of public officers seems to rest on three grounds (*x*):—1st, A principle of public policy. 2ndly, In some degree on the ground that, in many cases, not to make it would be to presume the party acting guilty of a breach of the law. 3rdly, That, in the case of public appointments, there are facilities for disproving the regularity of the appointment, which do not exist in the case of the agents of private individuals.

2. Official acts.

§ 359. 2. The maxim, "Omnia præsumuntur ritè esse acta," holds in many cases where acts are required to be done by official persons, or with their concurrence. Thus, the courts will presume in favour of a return to a mandamus (*y*); and where a parish certificate, which

(*r*) *Butler* v. *Ford*, 1 Cr. & M. 662.

(*s*) *R.* v. *Murphy*, 8 C. & P. 310, per Coleridge, J. The acts of Parliament in that case, namely, the 56 Geo. 3, c. xxix, and 1 & 2 Geo. 4, c. xxiv, are stated in the report to be *private* acts, but it appears that they contain clauses declaring them public acts.

(*t*) Previous to 15 & 16 Vict. c. 76, s. 55, executors and administrators were bound, in pleading, to make profert of the probate, or letters of administration. 1 Chit. Pl. 420, 6th Ed.

(*u*) *Short* v. *Lee*, 2 Jac. & W. 468.

(*x*) Many of the cases in the books rest on a totally distinct ground, namely, that the party against whom the evidence was offered had, by words or acts, admitted the character of the person described as an officer.

(*y*) Per Buller, J., in *R.* v. *Lyme Regis*, 1 Doug. 159.

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appeared to have been signed by only one churchwarden, had been allowed by two justices of the peace, a custom was presumed, for the parish to have only one churchwarden (*z*). And Lord Kenyon laid it down, that everything is to be intended in support of orders of justices, as contradistinguished to convictions (*a*). This must not, however, be understood to mean, that presumptions will be made inconsistent with the manifest probabilities of the case (*b*).

3. Judicial acts.

§ 360. 3. We next come to the consideration of judicial acts. These, from their very nature, are in general susceptible of more regular proof, so that the maxim, "Omnia præsumuntur ritè esse acta," has here a much more limited application. "With respect to the general principle of presuming a regularity of procedure," says Sir W. D. Evans, "it may perhaps appear to be the true conclusion, that wherever acts are apparently regular and proper, they ought not to be defeated by the mere suggestion of a possible irregularity. This principle however ought not to be carried too far, and it is not desirable to rest upon a mere presumption that things were properly done, when the nature of the case will admit of positive evidence of the fact, provided it really exists" (*c*). It is a principle that *irregularity* will not be presumed (*d*); and there are several instances to be found in the books, of the courts dispensing with formal proof of things necessary in strictness to give validity to judicial acts. Thus, a fine was presumed to have been levied with proclama-

(*z*) *R.* v. *Catesby*, 2 B. & C. 814. See also *R.* v. *Hinckley*, 12 East, 361, and *R.* v. *Bestland*, 1 Wils. 128.

(*a*) *R.* v. *Morris*, 4 T. R. 552. See also *R.* v. *Stockton*, 5 B. & Ad. 546.

(*b*) *R.* v. *Upton Gray*, 10 B. & C. 807.

(*c*) 2 Ev. Poth. 336.

(*d*) Macnam. Null. and Irregul. 42; per Alderson, B., in *Caunce* v. *Rigby*, 3 M. & W. 68; *James* v. *Heward*, 3 G. & Dav. 264.

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tions (*e*) even before 11 & 12 Vict. c. 70; and when a recovery has been suffered by a person who had power to do so, the maxim "Omnia præsumuntur ritè esse acta" applies, until the contrary appears (*f*). So it is a rule never to raise a presumption for the sake of overturning an award, but, on the contrary, to make every reasonable intendment in its support (*g*): although there are cases in the books which it might be difficult to reconcile with this principle.

Rule does not apply to give jurisdiction.

§ 361. The maxim "Omnia præsumuntur ritè esse acta" does not apply to give jurisdiction to magistrates, or other inferior tribunals (*h*). Thus, where a power was given to justices of the peace under a mutiny act, to take the examination of a soldier quartered at the place where the examination took place; and the examination, when taken, did not shew on the face of it that the soldier was quartered at that place; the Court of Queen's Bench held the examination not receivable for the purpose of proving a settlement, unless it were shewn by evidence that he was so quartered at the time (*i*).

4. Extra-judicial acts.

§ 362. 4. We next proceed to consider the application of this maxim to extra-judicial acts, such as written instruments, and matters in pais. Thus, it is an established rule that deeds, wills, and other attested documents, which are thirty years old or upwards, and are produced from an unsuspected repository, prove themselves, and the testimony of the subscribing witness

(*e*) 3 Co. 86 b.

(*f*) 3 Stark. Ev. 961, 3rd Ed.

(*g*) Caldwell, Arbitr. 132, 2nd Ed.; Watson, Aw. 175, 176, 3rd Ed.; Russell, Arbitr. 268, 681, 3rd Ed.; 3 Bulst. 66—7.

(*h*) *R.* v. *Hulcott*, 6 T. R. 583; *R.* v. *All Saints', Southampton*, 7 B. & C. 785; *Carratt* v. *Morley*, 1 Q. B. 18; *Dempster* v. *Purnell*, 4 Scott, N. R. 30; *Anon.*, 1 B. & Ad. 386, note; *R.* v. *Totness*, 11 Q. B. 80; *R.* v. *Bloomsbury*, 4 E. & B. 520.

(*i*) *R.* v. *All Saints', Southampton*, 7 B. & C. 785.

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may be dispensed with, although it is competent to the opposite party to call him to disprove the regularity of the execution (*k*). And there are many instances of the application of this presumption even where it is strictly necessary to prove the execution of an attested instrument. Thus, where a deed is produced, purporting to have been executed in due form by signing, sealing, and delivery, but the attesting witnesses can only speak to the fact of signing, it may be properly left to the jury to presume a sealing and delivery (*l*). So, where an agreement is stated to have been reduced to writing, signing will be presumed (*m*).

Execution of wills.

§ 363. The 7 Will. 4 & 1 Vict. c. 26, s. 9 (explained by 15 & 16 Vict. c. 24), requires wills to be in writing, and executed with certain formalities; and somewhat similar provisions with reference to wills of real estate were contained in the statute previously in force, the 29 Car. 2, c. 3, s. 5 (*n*). Under both statutes the courts have, in many instances, applied the maxim "Omnia præsumuntur ritè esse acta," to the execution of wills; and, as a general principle, they lean in favour of a fair will, so as not to defeat it for a slip in form, where the intention of the legislature has been complied with (*o*).

Collateral facts.

§ 364. So, collateral facts requisite to give validity to instruments will, in general, be presumed. Thus, where an instrument has been lost, it will be presumed to have

(*k*) 2 Phill. Ev. 245 *et seq.* 10th Ed. Vide *suprà*, bk. 2, pt. 3, chap. 1, §§ 220—1.

(*l*) *Burling* v. *Paterson*, 9 C. & P. 570; *Ball* v. *Taylor*, 1 C. & P. 417; *Grellier* v. *Neale*, 1 Peake, 146; *Talbot* v. *Hodson*, 7 Taunt. 251.

(*m*) *Rist* v. *Hobson*, 1 Sim. & S. 543.

(*n*) *Suprà*, bk. 2, pt. 3, chap. 1, § 222.

(*o*) *Right, Lessee of Cater*, v. *Price*, 1 Dongl. 241, 243; *Bond* v. *Seawell*, 3 Burr. 1773; 1 Jarman, Wills, 75 *et seq.*; *In the goods of Huckvale*, L. Rep., 1 P. & D. 375.

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been duly stamped (*p*); and where a party refuses to produce a document after notice, it will be presumed, at least against him, to have been duly stamped, unless the contrary appears (*q*). Where an ejectment was brought on the assignment of a term given by the defendant to secure the payment of an annuity, it was held unnecessary for the plaintiff to prove that the annuity had been inrolled in pursuance of the 17 Geo. 3, c. 26, as, if it were not enrolled, that would more properly come from the other side (*r*). This principle has also been extended to the construction of instruments. Thus, where deeds bear date on the same day, a priority of execution will be presumed, to support the clear intention of parties (*s*); as, for instance, where property is sought to be conveyed by lease and release, both of which are contained in one deed, a priority of execution of the lease will be presumed (*t*). So, in construing a deed or will, priority or posteriority in the collocation of words will be disregarded, in order to carry into effect the manifest intention of the parties (*u*).

Construction of instruments.

§ 365. It only remains to add that the principle in question has been much extended by modern statutes. We have already alluded to this subject when treating of the history of the rise and progress of the English law of evidence (*x*).

Principle much extended by modern statutes.

(*p*) Bk. 2, pt. 3, chap. 1, § 230.

(*q*) *Crisp* v. *Anderson*, 1 Stark. 35.

(*r*) *Doe* d. *Griffin* v. *Mason*, 3 Camp. 7. See acc. *Doe* d. *Lewis* v. *Bingham*, 4 B. & A. 672; and *The Brighton Railway Company* v. *Fairclough*, 2 Man. & G. 674.

(*s*) *Barker* v. *Keete*, 1 Freem. 251; *Taylor* d. *Atkyns* v. *Horde*, 1 Burr. 106.

(*t*) Per North, C. J., in *Barker* v. *Keete*, 1 Freem. 251.

(*u*) *Brice* v. *Smith*, Willes, 1; and the cases there cited; *Richards* v. *Bluck*, 6 C. B. 441.

(*x*) Bk. 1, pt. 2, § 118.

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Sub-Section V.

PRESUMPTIONS FROM POSSESSION AND USER.

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§ 366. The presumption of right in a party who is in the possession of property, or of that quasi possession of which rights only occasionally exerciseable are susceptible, is highly favoured in every system of jurisprudence (*x*); and seems to rest partly on principles of natural justice, and partly on public policy. By the law of England, possession, or quasi possession, as the case may be, is primâ facie evidence of property (*y*),—"Melior (potior) est conditio possidentis" (*z*); and the possession of real estate, or the perception of the rents and profits from the person in possession, is primâ facie evidence of the highest estate in that property, namely, a seisin in fee (*a*). But the strength of the presumption, arising from possession of any kind, is materially increased by the length of the time of enjoyment, and the absence of interruption or disturbance from others who, supposing it illegal, were interested in putting an end to it. In favour of such continued and peaceable enjoyment, the courts have gone great lengths in presuming not only a legal origin for it, but many collateral facts,

Presumption of right from possession, &c. highly favoured in jurisprudence.

Possession, &c. primâ facie evidence of property.

Presumption strengthened by length of enjoyment.

(*x*) Huberus, Præl. Jur. Civ. lib. 22, tit. 3, n. 16; Dig. lib. 50, tit. 17, ll. 126 & 128; Cod. lib. 4, tit. 19, l. 2; Sext. Decret. lib. 5, tit. 12, De Reg. Jur., Reg. 65; Co. Litt. 6 b.

(*y*) Ph. & Am. Ev. 472; 1 Ph. Ev. 484, 10th Ed.; 4 Taunt. 547; 2 Wms. Saund. 47 f, 6th Ed.

(*z*) 2 Inst. 391; 4 *Id.* 180; Plowd. 296; Hob. 103, 199; Vaugh. 60; 1 T. R. 153; 4 *Id.* 564.

(*a*) B. N. P. 103; *Jeyne* v. *Price*, 5 Taunt. 326; *Denn* d. *Tarzwell* v. *Barnard*, Cowp. 595; *Crease* v. *Barrett*, 1 C. M. & R. 931; *R.* v. *Overseers of Birmingham*, 1 B. & S. 763, 768, 770; *Metters* v. *Brown*, 1 H. & C. 686, 692.

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to render complete the title of the possessor, according to the maxim "Ex diuturnitate temporis, omnia præsumuntur solenniter esse acta"(*b*).

Division of the subject.

§ 367. In treating this important subject, it is proposed to consider, 1st, The presumption from long user of prescriptive and other rights to things which lie in grant, both at common law, and as affected by the statutes 2 & 3 Will. 4, cc. 71, and 100. 2ndly, Incorporeal rights not affected by those statutes. 3rdly, Presumptions of facts in support of beneficial enjoyment.

1. Presumption from long user of rights to certain things which lie in grant.

Prescription.

§ 368. Among the various ways in which a title to property can be acquired, most systems of jurisprudence recognize that of "prescription," or undisturbed possession or user for a period of time, longer or shorter as fixed by law (*c*). "Præscriptio est titulus ex usu et tempore substantiam capiens ab authoritate legis" (*d*). According to the common law of England, this species of title cannot be made to land or corporeal hereditaments (*e*), or to such incorporeal rights as must arise by matter of record (*f*); and it is in general restricted to things which may be created by grant (*g*), such as rights of common, easements, franchises which can be created by grant without record, &c. The reason for this is said to be, that every prescription supposes a grant, or some equivalent document, to have once existed, and

(*b*) Co. Litt. 6 b; Jenk. Cent. 4, Cas. 77; Palm. 427. This maxim is clearly a case where priora præsumuntur à posterioribus. See *suprà*, sub-sect. 4, § 354.

(*c*) Introd. Part 2, § 43.

(*d*) Co. Litt. 113 a.

(*e*) Dr. & Stud. Dial. 1, c. 8; Finch, Comm. Laws, 31; Vin. Abr. Prosc B. pl. 2; Brooke, Abr. Prosc. pl. 19; *Wilkinson* v. *Proud*, 11 M. & W. 33. A man may, however, prescribe to hold land as tenant in common with another. (Littleton, sect. 310; Brooke. Abr. in loc. cit. and Trespass, 122.)

(*f*) Co. Litt. 114 a; 5 Co. 109 b; Com. Dig. Franchises, A. 2.

(*g*) 2 Blackst. Comm. 265; 3 Cruise's Dig. 423, 4th Ed.; 1 Vent. 387.

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to have been lost by lapse of time (*h*). According to some eminent authorities, no claim by prescription could be made at the common law against the Crown (*i*), on the principle "nullum tempus occurrit regi."

§ 369. Customary rights differ from prescriptive in this, that the former are usages applicable to a district or number of persons, while the latter are rights claimed by one or more individuals, or by a corporation (*k*), as existing either in themselves and their ancestors or predecessors, or as annexed to particular property (*l*). The latter is called prescribing in a *que estate*, or, in other words, laying the prescription in the party and those whose estate he has. And here it is necessary to observe that, at the common law, every prescription must have been laid in the tenant of the fee simple; and that parties holding any inferior interest in the land could not prescribe, by reason of the imbecility of their estates, but were obliged to prescribe under cover of the tenant in fee, by alleging his immemorial right to the subject-matter of the claim, and deducing their own title from him (*m*).

§ 370. A prescriptive or customary right, in order to be valid, must have existed undisturbed from time

Requisites of a prescriptive right.

(*h*) 2 Blackst. Comm. 265; Butl. Co. Litt. 261 a, n. (1); *Potter* v. *North*, 1 Ventr. 387; 13 Hen. VII. 16 B. pl. 14.

(*i*) 2 Ro. Abr. 264, Prescription, C.; Com. Dig. Præsc. F. 1; Plowd. 243; 38 Ass. pl. 22. See, however, Plowd. 322; Hargr. Co. Litt. 119a, note (1); 114 b; 2 Inst. 168. It is difficult to see the reason of this if it be true, as stated in most of the books, that every prescription presupposes a grant before the time of legal memory (see the preceding note); and it is well known that a grant within the time of legal memory may be presumed against the Crown. (*Infrà.*) The maxim "nullum tempus occurrit regi" was modified by 9 Geo. 3, c. 16, and 32 Geo. 3, c. 58, and other modern statutes.

(*k*) Co. Litt. 113 b; 4 Co. 32 a; 3 Cruise's Dig. 422, 4th Ed.

(*l*) Co. Litt. 113 b, 121 a; 2 Blackst. Comm. 265.

(*m*) 2 Blackst. Comm. 264, 265.

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immemorial (*n*); by which, at the common law, was meant, as the words imply, that no evidence, verbal or written, could be adduced of any time when the right was not in existence (*o*); and the right was pleaded by alleging it to have existed "from time whereof the memory of man runneth not to the contrary" (*p*). But when the stat. West. 1 (3 Edw. I.), c. 39, had fixed a time of limitation in the highest real actions known to the law, it was considered unreasonable to allow a longer time in claims by prescription. Accordingly, by an equitable construction of that statute, a period of *legal* memory was established—in contradistinction to that of *living* memory—by which every prescriptive claim was deemed indefeasible, if it had existed from the first day of the reign of Richard I. (A.D. 1189) (*q*); and, on the other hand, to be at once at an end if shewn to have had its commencement since that period (*r*).

Legal and *living* memory.

§ 371. After the time of limitation had been further reduced to sixty years by 32 Hen. 9, c. 2, and in many cases, including the action of ejectment, to twenty years by 21 Jac. 1, c. 16, it might have been expected that, by a similar equitable construction, the time of prescription would have been proportionably shortened. This, however, was not done, and it remained as before (*s*). But the stat. 32 Hen. 8, c. 2, affected the subject in this way, that whereas, previously, a man might have prescribed for a right the enjoyment of which had been suspended for an indefinite number of years, it was thereby enacted, that no person should

(*n*) 1 Blackst. Comm. 76; Litt. sect. 170.

(*o*) Co. Litt. 115 a; Litt. sect. 170.

(*p*) Litt. sect. 170; 2 Ro. Abr. 269, Prescrip. M. pl. 16.

(*q*) Co. Litt. 115 a.

(*r*) *Id.*; 2 Blackst. Comm. 31; 2 Inst. 238; 3 Cruise's Dig. 425, 4th Ed.

(*s*) 2 Blackst. Comm. 31, n. (*u*); Gale on Easements, 89, 3rd Ed.

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make any prescription by the seisin or possession of his ancestors or predecessors, unless such seisin or possession had been within sixty years next before such prescription made.

§ 372. A prescriptive title once acquired may be destroyed by interruption. But this must be understood of an interruption of the right, not simply an interruption of the user (*t*). Thus a prescriptive right may be lost or extinguished, by an unity of possession of the right, with an estate in the land as high and perdurable as that in the subject-matter of the right (*u*); as, for instance, where a party entitled in fee to a right of way or common becomes seised in fee of the soil to which it is attached. But the taking any lesser estate in the land, only suspends the enjoyment of the subject-matter of the prescription, without extinguishing the right to it, which accordingly revives on the determination of the particular estate (*x*).

Evidence of prescription from modern user.

§ 373. The time of prescription thus remaining unaltered, it is obvious that, if strict proof were required of the exercise of the supposed right up to the time of Richard I., the difficulty of establishing a prescriptive claim must have increased with each successive generation. The mischief was, however, considerably lessened by the rules of evidence established by the courts. Modern possession and user being primâ facie evidence of property and right, the judges attached to them an artificial weight, and held that when uninterrupted, uncontradicted, and unexplained, they constitute proof from which a jury ought to infer a prescriptive right, coeval with the time of legal memory.

(*t*) Co. Litt. 114 b; *Canham* v. *Fisk*, 2 C. & J. 126, per Bayley, B.

(*u*) 3 Cruise's Dig. 428, 4th Ed.; Co. Litt. 114 b; 4 Co. 38 a; *R.* v. *Hermitage*, Carth. 241.

(*x*) 3 Cruise's Dig. 426, 4th Ed.

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The length of possession and user necessary for this purpose, depends in some degree on circumstances and the nature of the right claimed. On a claim of modus decimandi, where there is nothing in the amount of the sum alleged to be payable in lieu of tithe, inconsistent with its having been an immemorial payment, the regular proof should be payment of that amount in lieu of tithe by the parish, township, or farm, as far back as *living* memory will reach; coupled with evidence that, during that period, no tithes in kind have ever been paid in respect of that parish, township, or farm (*y*). So, generally, in the case of other things to which a title may be made by prescription, proof of enjoyment as far back as living memory, raises a presumption of enjoyment from the remote era (*z*). And a like presumption may be made from an uninterrupted enjoyment for a considerable number of years. "If," says Alderson, B., in the case of *Jenkins* v. *Harvey* (*a*), "an uninterrupted usage of upwards of seventy years, unanswered by any evidence to the contrary, were not sufficient to establish a right like the present" (i. e. a right to a toll on all coal brought into a port), "there are innumerable titles which could not be sustained." In that case,—the judge at Nisi Prius having directed the jury that he was not aware of any rule of law, which precluded them from presuming the immemorial existence of the right from the modern usage,—the Court of Exchequer held the direction improper; and that the correct mode of presenting the point to them would have been, that, from the uninterrupted modern usage they should find the immemorial existence of the payment, unless some evidence was given

(*y*) *Bree* v. *Beek*, 1 Younge, 244; *Chapman* v. *Monsen*, 2 P. Wms. 565; *Moore* v. *Bulloch*, Cro. Jac. 501; *Lynes* v. *Lett*, 3 Y. & J. 405; *Chapman* v. *Smith*, 2 Vez. sen. 506.

(*z*) First Report of Real Property Commissioners, 51; *Blewett* v. *Tregonning*, 3 A. & E. 554, per Littledale, J.; *R.* v. *Carpenter*, 2 Show. 48.

(*a*) 1 C. M. & R. 895.

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to the contrary (*b*). In an old case of *Bury* v. *Pope* (*c*) it was agreed by all the judges, that a period of thirty or forty years was insufficient to give such a title to lights, as would enable the owner of the land to maintain an action against the possessor of the adjoining soil for obstructing them. This, however, is inconsistent with the modern cases of *Cross* v. *Lewis* (*d*) and *R.* v. *Joliffe* (*e*). The latter of these was a quo warranto, calling on the defendant to shew upon what authority he claimed to exercise the office of mayor of the borough of Petersfield. The defendant set up an immemorial custom, for the jury of the court leet to present a fit person to be mayor of the borough, who presented him, the defendant; to which the Crown replied an immemorial custom, for the court leet to present a fit person to be bailiff, and that at the court by which the defendant was presented to be mayor, the steward nominated the persons composing the jury, and issued his precept to the bailiff to summon them, who did so accordingly; whereas by the law of the land, the steward should have issued his precept to the bailiff to summon a jury, and the particular persons should have been selected by the bailiff. To this the defendant rejoined, that from time immemorial the steward used to nominate the jurors: and at the trial it was proved that for more than twenty years such had been the practice. This was not answered by any evidence on the part of the Crown; and thereupon Burrough, J., who tried the case, told the jury that slight evidence, if uncontradicted, became cogent proof: and a verdict was given for the defendant. A rule was obtained for a new trial, on the ground that there was not sufficient evidence to warrant the finding of the jury; and Abbott, C. J., after argu-

(*b*) 1 C. M. & R. 877; and see *Shephard* v. *Payne*, 16 C. B., N. S. 132; *Lawrence* v. *Hitch*, L. Rep., 3 Q. B. 521, 532. Vide *suprà*, sect. 1, sub-sect. 2, § 326.

(*c*) Cro. El. 118.

(*d*) 2 B. & C. 686.

(*e*) *Id.* 54.

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ment, expressed himself as follows:—"Upon the evidence given, uncontradicted, and unexplained, I think the learned judge did right in telling the jury that it was cogent evidence, upon which they might find the issue in the affirmative. If his expression had gone even beyond that, and had *recommended* them to find such a verdict, I should have thought that the recommendation was fit and proper. A regular usage for twenty years, not explained or contradicted, is that upon which many private and public rights are held, there being nothing in the usage to contravene the public policy." Holroyd and Best, JJ., concurring, the rule was discharged.

Prescriptive claim not defeated by trifling variations in exercise of the right.

§ 1. Where there is general evidence of a prescriptive claim extending over a long time, the presumption of a right existing from time immemorial will not be defeated by proof of slight, partial, or occasional variations in the exercise or extent of the right claimed. This subject is well illustrated by the case of *R.* v. *Archdall* (*f*). In delivering the elaborate judgment of the court in that case, Littledale, J., says, p. 288, "It follows almost necessarily, from the imperfection and irregularity of human nature, that a uniform course is not preserved during a long period: a little advance is made at one time, a retreat at another; something is added or taken away, from indiscretion, or ignorance, or through other causes: and when by the lapse of years the evidence is lost which would explain these irregularities, they are easily made the foundation of cavils against the legality of the whole practice. So, also, with regard to title: if that which has existed from time immemorial be scrutinised with the same severity which may properly be employed in canvassing a modern grant, without making allowance for the changes and accidents

(*f*) 8 A. & E. 281.

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of time, no ancient title will be found free from objection: that, indeed, will become a source of weakness, which ought to give security and strength. It has therefore always been the well-established principle of our law, to presume everything in favour of long possession: and it is every day's practice to rest upon this foundation the title to the most valuable properties." There are several other cases illustrative of this principle. Thus, although in the case of a farm or district modus the occupiers are bound, in order to establish the prescription, to shew with reasonable precision, the description and boundaries of the lands said to be covered by it, and the identity of the lands for which the respective sums in lieu of tithes have been paid; still it has frequently been held in courts of equity, that a trifling and immaterial variation in the evidence, as to the boundaries of farms forming part of a district of considerable extent, when the greater part of such boundaries are tolerably certain, is not sufficient to destroy the modus payable in lieu of the tithes of land proved to be within such boundaries (*g*). So, again, in the case of *Bailey* v. *Appleyard* (*h*), it is laid down by Coleridge, J., that a plea of prescription will be supported by proof of a prescriptive right larger than that claimed, but of such a nature as to include it; and in *Welcome* v. *Upton* (*i*), Alderson, B., asks, "Would the claim of a party to a right of way be defeated, by shewing that some person had narrowed it by a few inches?" On the other hand, however, a general prescription is not supported by proof of a prescriptive right coupled with a condition (*k*).

User evidence although not sufficient to

§ 375. Although the user is not sufficiently long or uniform to raise the presumption of a prescriptive right,

(*g*) *Bailey* v. *Sewell*, 1 Russ. 239; *Rudd* v. *Wright*, 1 Younge, 147; *Rudd* v. *Champion*, *Id.* 173; *Bree* v. *Beck*, *Id.* 211. See *Ward* v. *Pomfret*, 1 Man. & Gr. 559.

(*h*) 8 A. & E. 161, 167. See *The Bailiffs of Tewkesbury* v. *Bricknell*, 1 Taunt. 142.

(*i*) 6 M. & W. 536, 540.

(*k*) *Paddock* v. *Forrester*, 3 Scott, N. R. 715; 3 M. & Gr. 903, and the cases there cited.

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raise presumption of prescriptive right.

still it is entitled to its legitimate weight as evidence from which, coupled with other circumstances, the jury may find the existence of the right.

Presumption of prescriptive right from enjoyment, how put an end to.

§ 376. The presumption of prescriptive right, derived from enjoyment however ancient, is instantly put an end to when the right is shewn to have originated within the period of legal memory (*l*); and it is of course liable to be rebutted by any species of legitimate evidence, direct or presumptive (*m*); or even by the nature of the alleged right itself, which may make it impossible that it should have existed from the time of Richard I. (*n*). The existence of an ancient grant without date is not, however, necessarily inconsistent with a prescriptive right; for the grant may either have been made before the time of legal memory, or in confirmation of a prescriptive right (*o*). So, in *Scales* v. *Key* (*p*), where, on a question of false return to a mandamus, the issue turned on the existence of an immemorial custom within the city of London; the jury having found that the custom existed to 1689 (the case was tried in 1834), the judge at Nisi Prius refused to ask them whether the custom existed after that year, and directed a verdict to be entered for the defendant; and this ruling was confirmed by the court in banc. So, in *Biddulph* v. *Ather* (*q*), where, in support of a prescriptive right to wreck, evidence was adduced of uninterrupted usage for ninety-two years, it was held not to be *conclusively* negatived by two allowances in eyre 400 years previous, and a subsequent judgment in trespass; and the judge having left the whole case to

(*l*) 2 Blackst. Com. 31; *Fisher* v. *Lord Graves*, 3 E. & Y., Tithe C. 1180.

(*m*) See *Taylor* v. *Cook*, 8 Price, 650, and the cases cited in the preceding notes.

(*n*) See *Bryant* v. *Foot*, L. Rep., 2 Q. B. 161; (in Cam. Scac.) 3 *Ib.* 497.

(*o*) *Addington* v. *Clode*, 2 W. Bl. 989.

(*p*) 11 A. & E. 819. See also *Welcome* v. *Upton*, 6 M. & W. 536.

(*q*) 2 Wils. 28.

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the jury, who found in favour of the claim, the court refused to disturb the verdict. So, a prescriptive claim to a right of way for a party and his servants, tenants and occupiers of a certain close, and a justification as his servant and by his command, is not necessarily disproved by shewing that the land had, fifty years before, been part of a large common, which was inclosed under the provisions of an inclosure act, and allotted to the ancestor of the party. The jury having found for the defendant, a rule was obtained to enter a verdict for the plaintiff, which was, however, discharged after argument. Parke, J., there says, "There is no rule of law which militates against the finding. From the usage, the jury might infer that the lord, if the fee were in him before the inclosure, had the right of way" (*r*). So it is laid down by Sir J. Leach, V. C., that, in the case of a modus decimandi, ancient documents cannot prevail against all proof of usage, unless they are consistent with each other, and unless the effect of them excludes, not the probability, but the possibility of the modus (*s*).

Title by non-existing grant.

§ 377. Notwithstanding the desire of the courts to uphold prescriptive rights, there were many cases in which the extreme length of the time of legal memory exercised a very mischievous effect; as the presumption from user, however strong, was liable to be altogether defeated by shewing the origin of the claim at any time since the 1 Rich. I. (A.D. 1189). Besides, possession and user are in themselves legitimate evidence of the existence of rights created since that period, the more obvious and natural proofs of which may have perished by time or accident. "Tempus," says Sir Edward Coke, "est edax rerum (*t*); and records and letters patent,

(*r*) *Codling* v. *Johnson*, 9 B. & C. 933. See further on this subject, *Hill* v. *Smith*, 10 East, 476; *Schoobridge* v. *Ward*, 3 M. & Gr. 896.

(*s*) *White* v. *Lisle*, 4 Madd. 224.

(*t*) 12 Co. 5.

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and other writings, either consume or are lost, or embezzled: and God forbid that ancient grants and acts should be drawn in question, although they cannot be shewn, which, at the first, was necessary to the perfection of the thing"(*u*). Acting partly on this principle, but chiefly for the furtherance of justice and the sake of peace, by quieting possession (*x*), the judges attached an artificial weight to the possession and user of such matters as lie in grant, where no prescriptive claim was put forward; and in process of time established it as a rule, that twenty years' adverse and uninterrupted enjoyment of an incorporeal hereditament, uncontradicted and unexplained, was cogent evidence from which the jury should be directed conclusively to presume a grant or other lawful origin of the possession (*y*). This period of twenty years seems to have been adopted by analogy to the Statute of Limitations, 21 Jac. 1, c. 16, which makes an adverse enjoyment for twenty years a bar to an action of ejectment; for, as an adverse possession of that duration gave a possessory title to the land itself, it seemed reasonable that it should afford a presumption of right to a minor interest arising out of the land (*z*). The practical effect of this quasi præsumptio juris, was considerably increased by the decision in *Read* v. *Brookman* (*a*), namely, that it was competent to plead a right to an incorporeal hereditament by deed, and excuse profert of the deed by alleging it to have been lost by time and accident. It became, therefore, a usual mode of claiming title to an incorporeal hereditament, to allege

(*u*) 12 Co. 5.

(*x*) *Bright* v. *Walker*, 1 C. M. & R. 217; *Eldridge* v. *Knott*, Cowp. 215.

(*y*) 3 Stark. Ev. 911, 3rd Ed.; 1 Greenl. Ev. § 17, 7th Ed.; 2 Wms. Saund. 175 a, 6th Ed.; *Bealey* v. *Shaw*, 6 East, 208; *Balston* v. *Bensted*, 1 Camp. 463; *Wright* v. *Howard*, 1 S. & Stu. 203; *Campbell* v. *Wilson*, 3 East, 294; *Lord Guernsey* v. *Rodbridges*, 1 Gilb. Eq. R. 4; *Bright* v. *Walker*, 1 C. M. & R. 217; &c.

(*z*) 3 Stark. Ev. 911, 3rd Ed.; 2 Wms. Saund. 175 *et seq.*, 6th Ed., and the cases there cited.

(*a*) 3 T. R. 151.

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a feigned grant within the time of legal memory, from some owner of the land or other person capable of making such grant, to some tenant or person capable of receiving it (*b*), setting forth the names of the supposed parties to the document (*c*), with the excuse for profert that the document had been lost by time and accident. On a traverse of the grant, proof of uninterrupted enjoyment for twenty years was held cogent evidence of its existence; and this was termed making title by "non-existing grant."

§ 378. Much confusion has arisen from the loose language to be found in some of the books on the subject of this presumption. In *Holcroft* v. *Heel* (*d*), where the grantee of a market under letters patent from the Crown, suffered another person to erect a market in his neighbourhood, and to use it for the space of twenty-three years without interruption, the Court of Common Pleas held, that the undisturbed possession of the market by the defendant for twenty-three years was a *clear bar* to the plaintiff's right of action. This case has, however, been strongly observed upon in 2 Wms. Saund. 175 c *et seq.* 6th Ed. In the case of *Darwin* v. *Upton* (*e*), Lord Mansfield says, "The enjoyment of lights, with the defendant's acquiescence for twenty years, is such decisive presumption of a right by grant or otherwise, that, unless contradicted or explained, the jury ought to believe it; but it is impossible that length of time can be said to be an *absolute bar*, like a statute of limitation; it is certainly a *presumptive bar*, which ought to go to the jury." And Buller, J., adds, "If the judge meant it" (i. e., twenty years' uninterrupted possession of windows) "was an absolute bar, he was certainly wrong; if only as a presumptive bar, he was right." The judgment of Lord Mansfield, in *The*

(*b*) Shelford's Real Property Acts, 57, 7th Ed.

(*c*) *Hendy* v. *Stevenson*, 10 East, 55.

(*d*) 1 B. & P. 400.

(*e*) 2 Wms. Saund. 175 c, 6th Ed.

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Mayor of Hull v. *Horner* (*f*), is to the same effect. Again, the presumption of right from twenty years' enjoyment of incorporeal hereditaments is often spoken of as a "*conclusive* presumption" (*g*); an expression almost as inaccurate as calling the evidence a "bar." If the presumption be "conclusive," it is a *præsumptio juris et de jure*, and not to be rebutted by evidence; whereas, the clear meaning of the cases is, that the jury ought to make the presumption, and act definitively upon it, unless it is encountered by adverse proof. "The presumption of right in such cases," says Mr. Starkie (*h*), "is not conclusive; in other words, it is not an inference of *mere law*, to be made by the courts; yet it is an inference which the courts advise juries to make, wherever the presumption stands unrebutted by contrary evidence." It remains to add, that the doctrine in question has only been fully established in modern times, and was not introduced without opposition (*i*).

§ 379. In order, however, to raise this presumption against the owner of the inheritance, the possession must be with his acquiescence; such a possession with the acquiescence of a tenant for life, or other inferior interest in the land, although evidence against the owner of the particular estate, will not bind the fee (*j*). But the acquiescence of the owner of the inheritance may

(*f*) Cowp. 102.

(*g*) 1 Greenl. Ev. § 17, 7th Ed.; per Lord Ellenborough in *Balston* v. *Bensted*, 1 Camp. 463, 465; and *Bealey* v. *Shaw*, 6 East, 208, 215; &c.

(*h*) 3 Stark. Ev. 911, 3rd Ed.

(*i*) "I will not contend," says Sir W. D. Evans, "that, after the decisions which have taken place, it may not be more convenient to the public, that the doctrine which has been extensively acted upon in the enjoyment of real estates, should be adhered to than departed from, though of very modern origin. * * * But I shall ever retain the sentiment, that the introduction of such a doctrine was a perversion of legal principles, and an unwarrantable assumption of authority." 2 Ev. Poth. 139.

(*j*) 2 Wms. Saund. 175, 6th Ed., and the cases there cited.

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either be proved directly, or inferred from circumstances (*k*). E. g., where, in order to prove that a way was public, evidence was given of acts of user by the public for nearly seventy years; but during the whole of that period the land had been on lease; and the jury were directed that they were at liberty, if they thought proper, to presume from these acts a dedication of the way to the public by the owner of the inheritance, at a time anterior to the land being leased; this was held to be a proper direction (*l*). And where the time has begun to run against the tenant of the fee, the interposition of a particular estate does not stop it (*m*).

§ 380. This presumption only obtains its practically conclusive character, when the evidence of enjoyment during the required period remains uncontradicted and unexplained. In the case of *Livett* v. *Wilson* (*n*), where in answer to an action of trespass, the defendant pleaded a right of way by lost grant: at the trial, before Gaselee, J., it appeared that there was conflicting evidence as to the undisputed user of the way, and the alleged right had been pretty constantly contested; whereupon the judge told the jury, that if they thought the defendant had exercised the right of way uninterruptedly for more than twenty years, by virtue of a deed, and that that deed had been lost, they should find a verdict for the defendant; and this ruling was fully confirmed by the court in banc. But the fact of possession for a less period than twenty years, is still a circumstance from which, when coupled with other evidence, a jury may infer the existence of a grant (*o*).

(*k*) *Gray* v. *Bond*, 2 B. & B. 667.

(*l*) *Winterbottom* v. *Lord Derby*, L. Rep., 2 Ex. 316.

(*m*) *Cross* v. *Lewis*, 2 B. & C. 686.

(*n*) 3 Bing. 115. See also *Doe* d. *Fenwick* v. *Reed*, 5 B. & A. 232, and *Dawson* v. *The Duke of Norfolk*, 1 Price, 246.

(*o*) *Bealey* v. *Shaw*, 6 East, 215; see per Tindal, C. J., in

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As against the Crown.

§ 381. We have seen that by the common law a title by prescription could not be made against the Crown (*p*). But this doctrine was not extended to the case of a supposed lost grant; although, in order to raise such a presumption against the Crown, a longer time was required than against a private individual (*q*). The same holds where it is sought to acquire a right in derogation of the rights of the public (*r*).

As against the rights of the public.

Pews.

§ 382. By the general law and of common right, the pews in the body of a church belong to the parishioners at large, for their use and accommodation, but the distribution of seats among them rests with the ordinary, whose officers the churchwardens are; and whose duty it is to place the parishioners according to their rank and station, subject to the control of the ordinary (*s*). But a right to a pew as appurtenant to an ancient *messuage* may be claimed by prescription, which presupposes a faculty (*t*); and it is only in this light, namely, as easements appurtenant to messuages, that the right to pews is considered in courts of common law (*u*). That right is either *possessory* or *absolute*. The

Hall v. *Swift*, 4 Bing. N. C. 381, 383.

(*p*) *Suprà*, § 368.

(*q*) 1 Greenl. Ev. § 45, 7th Ed.; Tayl. Ev. § 114, 4th Ed. See *Bedle* v. *Beard*, 12 Co. 4, 5; *Mayor of Hull* v. *Horner*, Cowp. 102; *Gibson* v. *Clark*, 1 Jac. & W. 159; *Roe* d. *Johnson* v. *Ireland*, 11 East, 280; *Goodtitle* d. *Parker* v. *Baldwin*, *Id.* 488; *Jewison* v. *Dyson*, 9 M. & W. 540; *Brune* v. *Thompson*, 4 Q. B. 543.

(*r*) *Weld* v. *Hornby*, 7 East, 195; *Chad* v. *Tilsed*, 2 B. & B. 403; *Vooght* v. *Winch*, 2 B. & A. 662; *R.* v. *Montague*, 4 B. & C. 598.

(*s*) *Corven's case*, 12 Co. 105—6; 3 Inst. 202; *Byerly* v. *Windus*, 5 B. & C. 1; *Pettman* v. *Bridger*, 1 Phillim. 323; *Fuller* v. *Lane*, 2 Add. 425; *Blake* v. *Usborne*, 3 Hagg. N. R. 733. See also *Mainwaring* v. *Giles*, 5 B. & A. 356; and *Bryan* v. *Whistler*, 8 B. & C. 288.

(*t*) *Parker* v. *Leach*, L. Rep., 1 P. C. 312, 327; *Pettman* v. *Bridger*, 1 Phillim. 324; *Walter* v. *Gunner*, 1 Hagg. C. R. 317; *Wyllie* v. *Mott*, 1 Hagg. N. R. 39.

(*u*) 3 Stark. Ev. tit. Pew, 861, 3rd Ed.

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ecclesiastical courts will protect a party who has been for any length of time in possession of a pew or seat, against a mere disturber, so far at least as to put him on proof of a paramount title (*v*). And where the right is claimed as appurtenant to a messuage within the parish, possession for a long series of years will give a title against a wrong doer in a court of common law (*w*). But where the origin of the pew is shewn, or the presumption is rebutted by circumstances, the prescriptive claim is at an end (*x*). In order, however, to raise the presumption of a right by prescription or faculty against the ordinary much more is required: and with respect to the length of occupation necessary for this purpose it is difficult to lay down any general rule (*y*).

Inconveniences of the old law.

§ 383. In this state of the law were passed the statutes 2 & 3 Will. 4, cc. 71 and 100. Notwithstanding all that had been done by facilitating the proof of prescriptive rights, and allowing the pleading of non-existing grants, cases still occurred in which the length of the time of prescription operated to the defeat of justice. On this subject the Real Property Commissioners expressed themselves as follows (*z*):—"In some cases the practical remedy fails, and the rule (of prescription) produces the most serious mischiefs. A right claimed by prescription is always disproved, by shewing that it did not or could not exist at any one point of

(*v*) *Pettman* v. *Bridger*, 1 Phillim. 324; *Spry* v. *Flood*, 2 Curt. 356.

(*w*) *Darwin* v. *Upton*, 2 Wms. Saund. 175 c, 6th Ed.; *Kenrick* v. *Taylor*, 1 Wils. 326; *Stocks* v. *Booth*, 1 T. R. 428; *Rogers* v. *Brooks*, *Id.* 431, n.; *Griffith* v. *Matthews*, 5 T. R. 296; *Jacob* v. *Dallow*, 2 L. Raym. 755.

(*x*) *Griffith* v. *Matthews*, 5 T. R. 296; *Morgan* v. *Curtis*, 3 Man. & Ry. 389.

(*y*) See *Ashly* v. *Freckleton*, 3 Lev. 73; *Kenrick* v. *Taylor*, 1 Wils. 326; *Griffith* v. *Matthews*, 5 T. R. 296; *Pettman* v. *Bridger*, 1 Phill. 325; *Walter* v. *Gunner*, 1 Hagg. C. R. 322; *Woolcoombe* v. *Ouldridge*, 3 Add. 6; *Pepper* v. *Barnard*, 12 L. J., Q. B. 361.

(*z*) First Report of the Real Property Commissioners, 51.

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time since the commencement of legal memory, &c., &c. Amidst these difficulties, it has been usual of late, for the purpose of supporting a right which has been long enjoyed, but which can be shewn to have originated within time of legal memory, or to have been at one time extinguished by unity of possession, to resort to the clumsy fiction of a lost grant, which is pleaded to have been made by some person seised in fee of the servient, to another seised in fee of the dominant tenement. But besides the objection of its being well known to the counsel, judge and jury that the plea is unfounded in fact, the object is often frustrated by proof of the title of the two tenements having been such, that the fictitious grant could not have been made in the manner alleged in the plea. The contrivance therefore affords only a chance of protection, and may stimulate the adversary to an investigation, for an indirect and mischievous end, of ancient title-deeds, which for every fair purpose have long ceased to be of any use." There was also this inconvenience, that the evidence necessary to support a claim by lost grant would not support a claim by prescription; so that a plea of the former might miscarry from the evidence going too far (*a*). Add to all which, it was well observed that the requiring juries to make artificial presumptions of this kind amounted, in many cases, to a heavy tax on their consciences, which it was highly expedient should be removed (*b*). In a word, it became at length apparent that the evil could only be remedied by legislation, and the statutes in question were passed for that purpose.

2 & 3 Will. 4, c. 71.

§ 384. The former of these statutes, the 2 & 3 Will. 4, c. 71, intituled "An Act for shortening the Time of Pre-

(*a*) See per Littledale, J., in *Blewett* v. *Tregonning*, 3 A. & E. 583, 584.

(*b*) 2 Stark. Evid. 911, n. (*l*), 3rd Ed.; per Parke, B., in delivering the judgment of the court in *Bright* v. *Walker*, 1 C. M. & R. 217—218.

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scription in certain Cases," after reciting that "the expression, 'time immemorial, or time whereof the memory of man runneth not to the contrary,' is now by the law of England in many cases considered to include and denote the whole period of time from the reign of King Richard the First, whereby the title to matters that have been long enjoyed is sometimes defeated by shewing the commencement of such enjoyment, which is in many cases productive of inconvenience and injustice;" for remedy thereof proceeds to enact, in the first section, that, "No claim which may be lawfully made at the Sect. 1.
common law, by custom, prescription, or grant, to any right of common or other profit or benefit to be taken and enjoyed from or upon any land of our sovereign lord the King, his heirs or successors, or any land being parcel of the Duchy of Lancaster or Duchy of Cornwall, or of any ecclesiastical or lay person, or body corporate, except such matters and things as are herein specially provided for, and except tithes, rent, and services, shall, where such right, profit, or benefit shall have been actually taken and enjoyed by any person claiming right thereto without interruption for the full period of thirty years, be defeated or destroyed by shewing only that such right, profit, or benefit was first taken or enjoyed at any time prior to such period of thirty years, but nevertheless such claim may be defeated in any other way by which the same is now liable to be defeated; and when such right, profit, or benefit shall have been so taken and enjoyed as aforesaid for the full period of sixty years, the right thereto shall be deemed absolute and indefeasible, unless it shall appear that the same was taken and enjoyed by some consent or agreement expressly made or given for that purpose, by deed or writing."

Sect. 2. "No claim which may be lawfully made at Sect. 2.
the common law, by custom, prescription, or grant, to any way or other easement, or to any watercourse, or

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the use of any water, to be enjoyed or derived upon, over, or from any land or water of our said Lord the King, his heirs or successors, or being parcel of the Duchy of Lancaster or the Duchy of Cornwall, or being the property of any ecclesiastical or lay person, or body corporate, when such way or other matter as herein last before-mentioned shall have been actually enjoyed by any person claiming right thereto without interruption for the full period of twenty years, shall be defeated or destroyed by shewing only that such way or other matter was first enjoyed at any time prior to such period of twenty years, but nevertheless such claim may be defeated in any other way by which the same is now liable to be defeated; and where such way or other matter as herein last before-mentioned shall have been so enjoyed as aforesaid for the full period of forty years, the right thereto shall be deemed absolute and indefeasible, unless it shall appear that the same was enjoyed by some consent or agreement expressly given or made for that purpose by deed or writing."

Sect. 3. Sect. 3. "When the access and use of light to and for any dwelling-house, workshop, or other building shall have been actually enjoyed therewith for the full period of twenty years without interruption, the right thereto shall be deemed absolute and indefeasible, any local usage or custom to the contrary notwithstanding, unless it shall appear that the same was enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing."

Sect. 4. Sect. 4. "Each of the respective periods of years hereinbefore mentioned shall be deemed and taken to be the period next before some suit or action wherein the claim or matter to which such period may relate shall have been or shall be brought into question, and no act or other matter shall be deemed to be an interruption, within the meaning of this statute, unless the same shall have been or shall be submitted to or ac-

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quiesced in for one year after the party interrupted shall have had or shall have notice thereof, and of the person making or authorizing the same to be made."

Sect. 5. "In all actions upon the case and other pleadings, wherein the party claiming may now by law allege his right generally, without averring the existence of such right from time immemorial, such general allegation shall still be deemed sufficient, and if the same shall be denied, all and every the matters in this act mentioned and provided, which shall be applicable to the case, shall be admissible in evidence to sustain or rebut such allegation; and that in all pleadings to actions of trespass, and in all other pleadings wherein before the passing of this act it would have been necessary to allege the right to have existed from time immemorial, it shall be sufficient to allege the enjoyment thereof as of right by the occupiers of the tenements in respect whereof the same is claimed, for and during such of the periods mentioned in this act as may be applicable to the case, and without claiming in the name or right of the owner of the fee, as is now usually done; and if the other party shall intend to rely on any proviso, exception, incapacity, disability, contract, agreement, or other matter hereinbefore mentioned, or on any cause or matter of fact or of law not inconsistent with the simple fact of enjoyment, the same shall be especially alleged and set forth in answer to the allegation of the party claiming, and shall not be received in evidence on any general traverse or denial of such allegation." Sect. 5.

Sect. 6. "In the several cases mentioned in and provided for by this act, no presumption shall be allowed or made in favour or support of any claim, upon proof of the exercise or enjoyment of the right or matter claimed, for any less period of time or number of years than for such period or number, mentioned in this act, as may be applicable to the case and to the nature of the claim." Sect. 6.

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Sect. 7. Sect. 7. "The time during which any person, otherwise capable of resisting any claim to any of the matters before mentioned, shall have been or shall be an infant, idiot, non compos mentis, feme covert, or tenant for life, or during which any action or suit shall have been pending, and which shall have been diligently prosecuted until abated by the death of any party or parties thereto, shall be excluded in the computation of the periods hereinbefore mentioned, except only in cases where the right or claim is hereby declared to be absolute and indefeasible."

Sect. 8. Sect. 8. "When any land or water upon, over, or from which any such way or other convenient watercourse or use of water shall have been, or shall be enjoyed or derived, hath been or shall be held under or by virtue of any term of life, or any term of years exceeding three years from the granting thereof, the time of the enjoyment of any such way or other matter, as herein last before-mentioned, during the continuance of such term, shall be excluded in the computation of the said period of forty years, in case the claim shall, within three years next after the end or sooner determination of such term, be resisted by any person entitled to any reversion expectant on the determination thereof."

Construction of this statute. § 385. A large number of decisions on the construction of this important statute are to be found in the books, the discussion of which would be altogether out of place here. There are, however, a few points which require notice. 1. The earlier sections of the statute, being in the affirmative, do not take away the common law; and consequently do not prevent a party pleading a prescriptive claim, or claim by lost grant, in the same manner as he might have done before the act passed; and it is common in practice for a party to state his claim differently in several counts or pleas, relying in

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some on the common law, and in others on the statute (*b*). 2. The words in sect. 4,—"some suit or action wherein the claim or matter to which such period may relate shall have been or shall be brought in question,"—mean, generally, *any* such suit or action; and not, individually, *each* suit or action in which the question may from time to time arise (*c*). 3. The word "presumption" in the 6th section is used in the sense of *artificial* presumption, or presumption which without any other evidence shifts the burden of proof; the meaning of the section being, that no inference shall be drawn from the *unsupported* fact of an enjoyment for less than the prescribed number of years. But it was not intended to divest enjoyment for a shorter period of its natural weight as evidence, so as to preclude a jury from taking it into consideration, with other circumstances, as evidence of a grant; which accordingly they may still find to have been made, if they are satisfied that it was made in point of fact (*d*). 4. The statute does not apply to easements or profits à prendre *in gross*, e. g. to a claim of free fishery in the waters of another (*e*). Lastly, it will be observed, that while the 2nd section speaks of "any way or other *easement*, watercourse, or use of water," the 8th uses the words "way or other *convenient* watercourse, or use of water;" and two suppositions have been advanced to explain this apparent inconsistency: one, that the word "convenient" has crept into this section by mistake, instead of "easement;" the other, that "convenient" is a mistake for "convenience," a word used in old books as synonymous with easement (*f*).

(*b*) See *Blewett* v. *Tregonning*, 3 A. & E. 554; *Wilkinson* v. *Proud*, 11 M. & W. 33; *Lowe* v. *Carpenter*, 6 Exch. 825; *Warburton* v. *Parke*, 2 H. & N. 64; &c.

(*c*) *Cooper* v. *Hubbuck*, 12 C. B., N. S. 456, 467.

(*d*) See *Bright* v. *Walker*, 1 C. M. & R. 211.

(*e*) *Shuttleworth* v. *Le Fleming*, 19 C. B., N. S. 687.

(*f*) Gale on Easements, 104, 3rd Ed.

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2 & 3 Will. 4. c. 100.

§ 386. We have seen that "tithes, rent and services" are excepted out of the 2 & 3 Will. 4, c. 71, s. 1. The two latter are provided for by the Statute of Limitations, 3 & 4 Will. 4, c. 27; the provisions of which are irrelevant to our present purpose; and the former by 2 & 3 Will. 4, c. 100, which, in its first section, enacts, that "all prescriptions and claims of or for any modus decimandi, or of or to any exemption from or discharge of tithes, by composition real or otherwise, shall, in cases where the render of tithes in kind shall be hereafter demanded by our lord the king, his heirs or successors, or by any Duke of Cornwall, or by any lay person, not being a corporation sole, or by any body corporate of many, whether temporal or spiritual, be sustained and be deemed good and valid in law, upon evidence shewing, in cases of claim of a modus decimandi, the payment or render of such modus, and, in cases of claim to exemption or discharge, shewing the enjoyment of the land, without payment or render of tithes, money, or other matter in lieu thereof, for the full period of thirty years next before the time of such demand, unless, in the case of claim of a modus decimandi, the actual payment or render of tithes in kind, or of money or other thing differing in amount, quality, or quantity from the modus claimed, or, in case of claim to exemption or discharge, the render or payment of tithes, or of money or other matter in lieu thereof, shall be shewn to have taken place at some time prior to such thirty years, or it shall be proved that such payment or render of modus was made, or enjoyment had by some consent or agreement expressly made or given for that purpose by deed or writing: and if such proof in support of the claim shall be extended to the full period of sixty years next before the time of such demand, in such cases the claim shall be deemed absolute and indefeasible, unless it shall be proved that such payment or render of modus was made, or enjoyment had by some consent or agreement expressly made or given for that purpose by deed or

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writing; and where the render of tithes in kind shall be demanded by any archbishop, bishop, dean, prebendary, parson, vicar, master of hospital, or other corporation sole, whether spiritual or temporal, then every such prescription or claim shall be valid and indefeasible, upon evidence shewing such payment or render of modus made or enjoyment had, as is hereinbefore mentioned, applicable to the nature of the claim, for and during the whole time that two persons in succession shall have held the office or benefice in respect whereof such render of tithes in kind shall be claimed, and for not less than three years after the appointment and institution or induction of a third person thereto: Provided always, that if the whole time of the holding of such two persons shall be less than sixty years, then it shall be necessary to shew such payment or render of modus made or enjoyment had (as the case may be), not only during the whole of such time, but also during such further number of years, either before or after such time, or partly before and partly after, as shall with such time be sufficient to make up the full period of sixty years, and also for and during the further period of three years after the appointment and institution or induction of a third person to the same office or benefice; unless it shall be proved that such payment or render of modus was made, or enjoyment had by some consent or agreement expressly made or given for that purpose by deed or writing." By sect. 8, "In the several cases mentioned in and provided for by this act, no presumption shall be allowed or made in favour or support of any claim, upon proof of the exercise or enjoyment of the right or matter claimed, for any less period of time or number of years than for such period or number mentioned in this act as may be applicable to the case and to the nature of the claim" (*g*). This enact- Has not taken

(*g*) There are several other provisions and exceptions in this statute which are not inserted, as the practical operation of presumptive evidence of exemption from tithe has been almost put an end to by

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away the common law.

ment, like the former, has not taken away the common law (*h*).

2. Incorporeal rights not affected by 2 & 3 Will. 4, cc. 71 & 100.

Presumption of the dedication of highways to the public.

§ 387. 2. We proceed, in the second place, to consider the presumptions made from user of incorporeal rights not coming within the statutes above referred to. Among the foremost of these may be ranked the presumption of the dedication of highways to the public. "A road," says Littledale, J., in *R.* v. *Mellor* (*i*), "becomes public by reason of a dedication of the right of passage to the public by the owner of the soil, and of an acceptance of the right by the public." A dedication by the owner is insufficient without an acceptance on the part of the public (*j*). The fact of dedication may either be proved directly, or inferred from circumstances (*k*), especially from that of permissive user on the part of the public. If a man opens his land so that the public pass over it continually, the public, after a user of a very few years, will acquire a right of way (*l*), unless some act be done by the owner to shew that he had only intended to give a licence to pass over the land, and not to dedicate a right of way to the public (*m*). Among acts of this kind may be reckoned the putting up a bar, or excluding by positive prohibition persons from passing (*n*). The common course is by shutting up the passage for one day in each year (*o*).

the Tithe Commutation Act, 6 & 7 Will. 4, c. 71, and subsequent acts. The 2 & 3 Will. 4, c. 100, has been amended in some respects by 4 & 5 Will. 4, c. 83.

(*h*) *The Earl of Stamford* v. *Dunbar*, 13 M. & W. 822.

(*i*) 1 B. & Ad. 32, 37.

(*j*) *R.* v. *Mellor*, 1 B. & Ad. 32; *R.* v. *St. Benedict*, 4 B. & A. 447.

(*k*) *R.* v. *Wright*, 3 B. & Ad. 681; *Surrey Canal Company* v. *Hall*, 1 Man. & Gr. 392; *R.* v. *St. Benedict*, 4 B. & A. 447.

(*l*) *The British Museum* v. *Finnis*, 5 C. & P. 460; *Lade* v. *Shepherd*, 2 Str. 1004.

(*m*) *Barraclough* v. *Johnson*, 8 Ad. & E. 99.

(*n*) *R.* v. *Lloyd*, 1 Camp. 260; *Roberts* v. *Karr*, *Id.* 262, n.; *Lethbridge* v. *Winter*, *Id.* 263, n.

(*o*) Per Patteson, J., in *The British Museum* v. *Finnis*, 5 C. & P. 460, 465. But the keeping

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Where no acts of this nature have been done, there is no fixed rule as to the length of user which is sufficient, when unaccompanied by other circumstances, to constitute presumptive evidence of a dedication; but unquestionably a much shorter time will suffice than is required to raise the presumption of a grant among private individuals. In the case of *The Rugby Charity* v. *Merryweather* (*p*), Lord Kenyon says, that, "in a great case, which was much contested, six years was held sufficient:" and where the existence of a highway would be beneficial to the owner of the soil, a dedication has been presumed from a user of four or five years (*q*). But the animus or intention of the owner of the soil in doing the act, or permitting the passage, must be taken into consideration (*r*). "In order," says Parke, B., in *Poole* v. *Huskinson* (*s*), "to constitute a valid dedication to the public of a highway by the owner of the soil, it is clearly settled that there must be an *intention* to dedicate—there must be an *animus dedicandi*, of which the user by the public is *evidence*, and no more; and a single act of interruption by the owner is of much more weight, upon a question of intention, than many acts of enjoyment." And this animus or intention is to be determined by the jury (*t*). But the dedication of a highway to the public must be the act, or at least with the consent, of the owner of the fee; the act or assent of a tenant for any less interest will not suffice (*u*); although the assent of the

a gate across a road is not *conclusive* evidence against its being a public way, for it may have been granted with the reservation of keeping a gate in order to prevent cattle straying. *Davies* v. *Stephens*, 7 C. & P. 570.

(*p*) 11 East, 376, n.

(*q*) *Jarvis* v. *Dean*, 3 Bing. 447.

(*r*) *Poole* v. *Huskinson*, 11 M. & W. 827; *R.* v. *The Inhabitants of East Mark*, 11 Q. B. 877.

(*s*) 11 M. & W. 827, 830.

(*t*) *Barraclough* v. *Johnson*, 8 A. & E. 99; *Surrey Canal Company* v. *Hall*, 1 Man. & G. 392.

(*u*) *Baxter* v. *Taylor*, 1 Nev. & M. 11; *R.* v. *Bliss*, 7 A. & E. 550; *Wood* v. *Veal*, 5 B. & A. 454.

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owner of the inheritance may be inferred from circumstances (*v*). Upon the whole, the public are favoured in questions of this nature (*x*); and it seems, that when a road has once been a king's highway, no lapse of time or cessation of user will deprive the public of the right of passage whenever they please to resume it (*y*). The presumption in question can, it is said, be made against the Crown (*z*).

Presumption of surrender or extinguishment of rights by non-user.

§ 388. The next subject calling for attention here, is the presumption of the surrender or extinguishment of incorporeal rights by *non-user*. This is altogether unaffected by the prescription acts (*a*), and the general principle is thus stated by Abbott, C. J., in *Doe* d. *Putland* v. *Hilder* (*b*): "The long enjoyment of a right of way by A. to his house or close, over the land of B., which is a prejudice to the land, may most reasonably be accounted for, by supposing a grant of such right by the owner of the land: and if such a right appear to have existed in ancient times, a long forbearance to exercise it, which must be inconvenient and prejudicial to the owner of the house or close, may most reasonably be accounted for, by supposing a release of the right. In the first class of cases, therefore, a grant of the right, and in the latter, a release of it, is presumed." But the result of the cases on this subject would seem to be, that the non-user of a privilege or easement, is merely evidence of abandonment; and that the question

(*v*) *Winterbottom* v. *Lord Derby*, L. Rep., 2 Ex. 316; *Davies* v. *Stephens*, 7 Car. & P. 570; *R.* v. *Barr*, 4 Camp. 16; *Jarvis* v. *Dean*, 3 Bing. 447; *R.* v. *Hudson*, 2 Str. 909; *Harper* v. *Charlesworth*, 4 B. & C. 574.

(*x*) *R.* v. *The Inhabitants of East Mark*, 11 Q. B. 877; *R.* v. *Petrie*, 4 E. & B. 737.

(*y*) 2 Selw. N. P. 1362, 9th Ed.; *Dawes* v. *Hawkins*, 8 C. B., N. S. 848, 858.

(*z*) *R.* v. *The Inhabitants of East Mark*, 11 Q. B. 877. See *ante*, §§ 368, 381.

(*a*) Gale on Easements, 354, 3rd Ed.

(*b*) 2 B. & A. 782, 791.

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of abandonment is one of fact, which must be determined on the whole of the circumstances of each particular case (*c*).

Easements.

§ 389. With respect to the presumed extinguishment of "Easements" from cessation of enjoyment, the following principles are laid down in a text work (*d*): "Though the law regards with less favour the acquisition and preservation of these accessorial rights than of those which are naturally incident to property, and, therefore, does not require the same amount of proof of the extinction as of the original establishment of the right: yet as an easement, when once created, is perpetual in its nature, being attached to the inheritance and passing with it, it should seem that some acquiescence on the part of the owner of the inheritance must be necessary, to give validity to any act of abandonment." Now easements are divided into *continuous* and *intermittent*—the former being those of which the enjoyment is or may be continual, without the necessity of any actual interference by man; as waterspouts, the right to air, light, &c.; and the latter being those of an opposite description, such as rights of way, &c. With respect to *continuous* easements, the correct inference from the cases seems to be, that there is no time fixed by law during which the cessation of enjoyment must continue, in order to raise the presumption of an abandonment; but it is for the jury to take all the circumstances of the case into their consideration, in order to see if there has been an intention to renounce the right (*e*). It was held by Lord Ellenborough at nisi

(*c*) See per Wood, V. C., *Crossley* v. *Lightowler*, L. Rep., 3 Eq. 279, 292; *Eldridge* v. *Knott*, Cowp. 214; *Simpson* v. *Gutteridge*, 1 Madd. 609.

(*d*) Gale on Easements, 353, 354, 3rd Ed.

(*e*) Gale on Easements, 360, 3rd Ed, citing *Liggins* v. *Inge*, 7 Bing. 682, 693, per Tindal, C. J.; *Hale* v. *Oldroyd*, 14 M. & W. 789; *Lawrence* v. *Obee*, 3 Camp. 514.

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prius, that where a window has been shut up for twenty years, the case stands as if it had never exised (*f*).

§ 390. With respect to easements of the *intermittent* kind, there are some expressions to be found in the books which strongly favour the notion, that in order to raise the presumption of extinguishment from non-user alone, it must have reached the full period of twenty years (*g*); in analogy to the Statute of Limitations, and the rule established respecting title by non-existing grant (*h*). But it seems clear that mere intermittance of the user, or slight alterations in the mode of enjoyment, will not be sufficient to destroy the right when circumstances do not shew any intention of relinquishing it (*i*); whilst, on the other hand, a much shorter period than twenty years, when it is accompanied by circumstances, such as disclaimer, or other indication of intention to abandon the right, will be sufficient to raise the presumption of extinguishment (*k*).

Licences.

§ 391. *Licences* may be presumed; and, as a general rule, from a much shorter period of enjoyment than twenty years (*l*).

3. Presumptions of facts in support of

§ 392. 3. We proceed lastly to the numerous important presumptions of facts made in support of beneficial

(*f*) *Lawrence* v. *Obee*, 3 Camp. 514.

(*g*) Gale on Easements, 378, 379, 380, 3rd Ed., citing Co. Litt. 114 b; *Doe* d. *Putland* v. *Hilder*, 2 B. & A. 782, 791, per Abbott, C. J.; *Moore* v. *Rawson*, 3 B. & C. 332, 339, per Littledale, J.; *Holmes* v. *Buckley*, 1 Eq. Ca. Abr. 27; &c.

(*h*) *Suprà*, § 377.

(*i*) Gale on Easements, 380, 3rd Ed., citing *Payne* v. *Shedden*, 1 M. & Rob. 382; *R.* v. *The Inhabitants of Chorley*, 12 Q. B. 515; *Ward* v. *Ward*, 7 Exch. 838; *Lovell* v. *Smith*, 3 C. B., N. S. 120, &c.

(*k*) Gale on Easements, 381, 3rd Ed.; *Norbury* v. *Meade*, 3 Bligh, 241, 242; *Harvie* v. *Rogers*, 3 Bligh, N. S. 440; *R.* v. *Chorley*, 12 Q. B. 515; *Ward* v. *Ward*, 7 Exch. 838.

(*l*) Phill. & Am. Ev. 478; 1 Phill. Ev. 491, 10th Ed.; *Doe* d. *Foley* v. *Wilson*, 11 East, 56; *Goodtitle* d. *Parker* v. *Baldwin*, *Id.* 488; *Ditcham* v. *Bond*, 3 Camp. 524; *Doe* d. *Earl of Dunraven* v. *Williams*, 7 C. & P. 332.

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enjoyment. The general principle governing the subject is thus stated by Tindal, C. J., in *Doe* d. *Hammond* v. *Cooke* (*m*): "No case can be put in which any presumption" (semble, any *artificial* presumption) "has been made, except where a title has been shewn by the party who calls for the presumption, good in substance, but wanting some collateral matter to make it complete in point of form. In such case, where the possession is shewn to have been consistent with the existence of the fact directed to be presumed, and in such cases only, has it ever been allowed." Presumptions of this kind are entitled to additional weight if the possession would otherwise be unlawful, or incapable of satisfactory explanation (*n*). On the other hand, the terms in which the presumption will be brought under the notice of the jury, are considerably influenced by the nature of the document or other matter to be presumed, the facility or difficulty of adducing more direct proof, and by the right in question being favoured or disfavoured by law.

beneficial enjoyment. General principle.

§ 393. There is hardly a species of act or document, public or private, that will not be presumed in support of possession. Matters of record generally (*o*), and even acts of parliament (*p*), at least very ancient ones (*q*), will thus be presumed; as also will grants from the crown (*r*), letters patent (*s*), writs of ad quod damnum and inquisitions thereon (*t*), bye-laws of corporations (*u*),

Instances.

(*m*) 6 Bing. 174, 179. See, also, 1 Greenl. Ev. § 46, 7th Ed.; 3 Stark. Ev. 935, 3rd Ed.; *The Attorney-General* v. *The St. Cross Hospital*, 17 Beav. 435.

(*n*) 1 Greenl. Ev. § 46, 7th Ed.

(*o*) Plowd. 411; Finch, L. 399, 400; Styl. 22.

(*p*) Skinn. 78; *Lopez* v. *Andrews*, 3 Man. & R. 329, n.; *Eldridge* v. *Knott*, Cowp. 215, per Lord Mansfield.

(*q*) *R.* v. *The Chapter of Exeter*, 12 A. & E. 532.

(*r*) *Mayor of Hull* v. *Horner*, Cowp. 102; *Gibson* v. *Clark*, 1 Jac. & W. 159; *Read* v. *Brookman*, 3 T. R. 158; *The Attorney-General* v. *The Dean of Windsor*, 24 Beav. 679.

(*s*) *Read* v. *Brookman*, 3 T. R. 158; *Pickering* v. *Lord Stamford*, 2 Ves. jun. 583.

(*t*) *R.* v. *Montague*, 4 B. & C. 598.

(*u*) *Case of Corporations*, 4 Co. 78, a.

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fines and recoveries (*x*), feoffments (*y*), the enfranchisement of copyholds (*z*), endowment of vicarages (*a*), exemption from tithes (*b*), consent of the ordinary to composition deeds (*c*), powers in charities to sell lands, and sales under such powers (*d*), orders of justices of the peace to stop up roads (*e*), &c. So, likewise, the fact of a particular person having sat in parliament in ancient times (*f*), the disseverance of tithes by the requisite parties previous to the restraining statutes (*g*), copyhold customs (*h*), admittance to (*i*) and surrender of copyholds (*k*), surrender by tenant for life (*l*), and lawful executorship (*m*), will be presumed from lapse of time. In one case it was held that induction might be presumed from fifteen years' undisturbed possession (*n*). And where it is proved that, from a very early period, there has been the constant performance of divine service in an ancient chapel, even although there be no proof that either marriages were solemnized or burials performed therein, this raises the presumption

(*x*) *Read* v. *Brookman*, 3 T. R. 151, 159, per Buller, J., citing *Hasselden* v. *Bradney*, T. 4 Geo. III. C. B. See *Doe* d. *Fenwick* v. *Reed*, 5 B. & A. 232.

(*y*) 21 Edw. IV. 74 B. pl. 5.

(*z*) *Roe* d. *Johnson* v. *Ireland*, 11 East, 280.

(*a*) *Crimes* v. *Smith*, 12 Co. 4; *Parsons* v. *Bellamy*, 3 E. & Y. 832; *Cope* v. *Bedford*, Palm. 426; *Wolley* v. *Brownhill*, M'Clel. 317; *Inman* v. *Whormby*, 1 Y. & J. 545; *Apperley* v. *Gill*, 1 C. & P. 316.

(*b*) *Norbury* v. *Meade*, 3 Bligh, 211; *Bayley* v. *Drever*, 1 A. & E. 449; *Rose* v. *Calland*, 5 Ves. 186.

(*c*) *Sawbridge* v. *Benton*, 2 Anst. 372.

(*d*) *St. Mary, Magdalen* v. *The Attorney-General*, 6 Ho. Lo. Cas. 189.

(*e*) *Williams* v. *Eyton*, 4 H. & N. 357.

(*f*) *Hasting's Peerage case*, 8 Cl. & Fin. 144.

(*g*) *Countess of Dartmouth* v. *Roberts*, 16 East. 334.

(*h*) *Doe* d. *Mason* v. *Mason*, 3 Wils. 63.

(*i*) Watkins on Copyholds, 269, Ed. 1797. See *Rawlinson* v. *Greeves*, 3 Bulst. 237.

(*k*) *Knight* v. *Adamson*, 2 Freem. 106; *Wilson* v. *Allen*, 1 Jac. & W. 611.

(*l*) 2 Wms. Saund. 42 d, 6th Ed.

(*m*) *R.* v. *Barnsley*, 1 M. & Selw. 377.

(*n*) *Chapman* v. *Beard*, 3 Anst. 942.

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that the chapel was consecrated (*o*). So, the lawful origin of a several fishery (*p*), the liability to repair fences (*q*), the right to land nets (*r*), the death of remote ancestors without issue (*s*), mesne assignments of leaseholds (*t*), re-conveyances by feoffee to feoffor (*u*), and by mortgagee to mortgagor (*v*), &c., &c., have in like manner been presumed.

Presumption of conveyances by trustees.

General rule.

§ 394. Under this head comes the important doctrine of the presumption of conveyances by trustees. It is a general rule, that whenever trustees ought to convey to the beneficial owner, it should be left to the jury to presume that they have so conveyed, where such presumption can reasonably be made (*x*). This rule has been established to prevent just titles from being defeated by mere matter of form, but it is not easy to determine the extent of it. It may, however, be stated generally, that the presumption ought to be one in favour of the owner of the inheritance, and not one against his interest (*y*); and the rule is subject to this further limitation, that the presumption cannot be

(*o*) *Rugg* v. *Kingsmill*, L. Rep., 1 Ad. & Ec. 343, 350; *Moysey* v. *Hillcoat*, 2 Hagg. N. S. 50.

(*p*) *Malcomson* v. *O'Dea*, 10 Ho. Lo. Cas. 593.

(*q*) *Barber* v. *Whiteley*, 34 L. J., Q. B. 212; *Boyle* v. *Tamlyn*, 6 B. & C. 329.

(*r*) *Gray* v. *Bond*, 2 B. & B. 667.

(*s*) *The Earl of Roscommon's Claim*, 6 Cl. & F. 97; *Doe* d. *Oldham* v. *Woolley*, 8 B. & C. 22.

(*t*) *Earl* d. *Goodwin* v. *Baxter*, 2 W. Bl. 1228; *White* v. *Foljambe*, 11 Ves. 350.

(*u*) *Tenny* d. *Whinnett* v. *Jones*, 3 M. & Scott, 472.

(*v*) *Cooke* v. *Soltau*, 2 S. & Stu. 154.

(*x*) 3 Sugd. V. & P. 25, 42, 43, 10th Ed.; 1 Greenl. Evid. § 46, 7th Ed.; *Doe* d. *Bowerman* v. *Sybourn*, 7 T. R. 2; *Keene* d. *Lord Byron* v. *Beardon*, 8 East, 263, 266; *Viscountess Stafford* v. *Llewellin*, Skin. 77; *Goodtitle* d. *Jones* v. *Jones*, 7 T. R. 43; *Doe* d. *Reede* v. *Reede*, 8 T. R. 122; *R.* v. *The Inhabitants of Upton Gray*, 10 B. & C. 807, 813, per J. Parke, J.; *England* d. *Syburn* v. *Slade*, 4 T. R. 682; *Wilson* v. *Allen*, 1 Jac. & W. 620; *Doe* d. *Hodsden* v. *Staple*, 2 T. R. 696; *Emery* v. *Grocock*, 6 Madd. 54.

(*y*) Phill. & Am. Ev. 476; *Doe* d. *Graham* v. *Scott*, 11 East, 483; *Doe* d. *Burdett* v. *Wrighte*, 2 B. & A. 719, 720.

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called for where it would be a breach of trust in the trustees to make the conveyance (*z*). On the same principle, re-conveyances from the trustees to the cestui que trust will be presumed (*a*), as also will, under proper circumstances, conveyances from old to new trustees (*b*).

Presumption of the surrender of terms by trustees for years.

§ 395. Few subjects have given rise to greater difference of opinion, than that of the presumption of the surrender of their terms by trustees for terms of years. In Lord Mansfield's time, the courts seem to have entertained notions upon it, which, if carried out in practice, would have gone far to enable them, by their own unsupported authority, to subvert trial by jury on the one hand, and confound all distinctions between legal and equitable jurisdiction on the other (*c*). In the case of *Lade* v. *Holford* (*d*), "Lord Mansfield," we are informed, "declared that he and many of the judges had resolved never to suffer a plaintiff in ejectment to be nonsuited by a term standing out in his own trustee, or a satisfied term set up by a mortgagor against a mortgagee, but direct the jury to presume it surrendered." There is no objection to the latter branch of this proposition, which has been always recognized in practice; for, by not assigning the term for the benefit of the mortgagee, whose money he has received, and afterwards setting it up against him, the mortgagor is guilty of a fraud; so that the presumption of the surrender of the term is really an application

(*z*) Phill. & Am. Ev. 476; *Keene* d. *Lord Byron* v. *Deardon*, 8 East, 267.

(*a*) *Hillary* v. *Waller*, 12 Ves. 250, 251. See 2 Sugd. Vend. & Pur. 196, 10th Ed.

(*b*) *Roe* d. *Eberall* v. *Lowe*, 1 H. Bl. 446.

(*c*) See 3 Sugd. Vend. & Pur. 39, 40, 42, 10th Ed.; *Evans* v. *Bicknell*, 6 Ves. 174, 184; *Lessee Lord Massey* v. *Touchstone*, 1 Sch. & L. 67, n. (*c*); *Wallwyn* v. *Lee*, 9 Ves. 31; *Doe* d. *Hodsden* v. *Staple*, 2 T. R. 696; *Doe* d. *Bristow* v. *Pegge*, 1 T. R. 758, n.

(*d*) Bull. N. P. 110.

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of the legal maxim which presumes against fraud and covin (*e*), and also of the rule which forbids a man to take advantage of his own wrong (*f*). And it has accordingly been held that such a presumption will not be made in favour of a prior mortgagee, against a subsequent mortgagee in possession of the title deeds, without notice of the prior incumbrance (*g*). But the general proposition, *never to suffer* a plaintiff to be non-suited by a term outstanding in his trustees, is, at least if taken in its literal sense, inconsistent with principle, and at variance with subsequent authority (*h*). The surrender of a term is a question of *fact;* and the court has not only no right, but it would be most dangerous, to advise a jury to presume such a surrender, when all the evidence clearly indicated that it had never been made.

Surrender of term presumable from circumstances.

§ 396. The surrender of a term, like any other fact, may be inferred from circumstances (*i*). It is said, however, that the fact of a term having been satisfied is not, when standing alone, sufficient to raise the presumption of a surrender, but that there must be some dealing with the term (*k*).

Surrender of term presumable from acts of owner of the inheritance, &c.

§ 397. Where acts are done or omitted by the owner of the inheritance and persons dealing with him as to the land, which ought not reasonably to be done or omitted if the term existed in the hands of a trustee, and if there do not appear to be any thing that should

(*e*) See 3 Sugd. Vend. & Pur. 42, 10th Ed., and per Abbott, C. J., in *Doe* d. *Putland* v. *Hilder*, 2 B. & A. 782, 790.

(*f*) See *infrà*, chap. 7.

(*g*) *Goodtitle* d. *Norris* v. *Morgan*, 1 T. R. 755; *Evans* v. *Bicknell*, 6 Ves. jun. 174, 184.

(*h*) *Doe* d. *Hodsden* v. *Staple*, 2 T. R. 684; *Doe* d. *Bowerman* v. *Sybourn*, 7 *Id.* 2; *Goodtitle* d. *Jones* v. *Jones*, *Id.* 43; *Doe* d. *Reade* v. *Reade*, 8 *Id.* 118; *Doe* d. *Shewen* v. *Wroot*, 5 East, 132.

(*i*) 3 Stark. Ev. 926, note (*m*), 3rd Ed.; *White* v. *Foljambe*, 11 Ves. 351; *Doe* d. *Brune* v. *Martyn*, 8 B. & C. 497; *Bartlett* v. *Downes*, 3 B. & C. 616.

(*k*) *Evans* v. *Bicknell*, 6 Ves. jun. 174, 185; *Day* v. *Williams*, 2 C. & J. 460; *Doe* d. *Hodsden* v. *Staple*, 2 T. R. 684.

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prevent a surrender from having been made, a surrender of the term may be presumed (*l*). But a term of years assigned to attend the inheritance will not, *as among purchasers or incumbrancers*, be presumed to have been surrendered, merely on the ground of its having remained, for a series of years, unnoticed in marriage settlements and other family documents; and the cases in which a contrary doctrine has been laid down must be considered as overruled (*m*). It seems, however, that in equity a term which has *not* been assigned to attend the inheritance, and which has not been disturbed for a long time, will be presumed to be surrendered, on a question of specific performance between seller and purchaser (*n*).

8 & 9 Vict. c. 112.

§ 398. A great change in the law on this subject has been effected by the stat. 8 & 9 Vict. c. 112, which, after reciting that "the assignment of satisfied terms has been found to be attended with great difficulty, delay, and expense, and to operate in many cases to the prejudice of the persons justly entitled to the lands to which they relate," enacts, in the first section, "that every satisfied term of years which, either by express declaration or by construction of law, shall upon the 31st day of December, 1845, be attendant upon the inheritance or reversion of any lands, shall on that day absolutely cease and determine as to the land upon the inheritance or reversion whereof such term shall be attendant as aforesaid, except that every such term of years which shall be so attendant as aforesaid by ex-

(*l*) Phill. & Am. Evid. 477; 1 Phill. Evid. 490, 10th Ed.; *Doe* d. *Putland* v. *Hilder*, 2 B. & A. 782, 791—2.

(*m*) See on this subject Sugden's V. & P. vol. 3, c. xv., 10th Ed., where the cases are collected and ably commented on: also *Doe* d. *Lord Egremont* v. *Langdon*, 12 Q. B. 711; *Garrard* v. *Tuck*, 8 C. B. 231; and *Cottrell* v. *Hughes*, 15 C. B. 532.

(*n*) 3 Sugd. V. & P. 66, 10th Ed., citing *Emery* v. *Grocock*, Madd. & G. 54, and *Ex parte Holman*, MS., 24th July, 1821.

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press declaration, although hereby made to cease and determine, shall afford to every person the same protection against every incumbrance, charge, estate, right, action, suit, claim, and demand, as it would have afforded to him if it had continued to subsist, but had not been assigned or dealt with, after the said 31st day of December, 1845, and shall for the purpose of such protection be considered in every court of law and of equity to be a subsisting term." By the 2nd section "Every term of years now subsisting or hereafter to be created, becoming satisfied after the said 31st day of December, 1845, and which, either by express declaration or by construction of law, shall after that day become attendant upon the inheritance or reversion of any lands, shall immediately upon the same becoming so attendant, absolutely cease and determine as to the land upon the inheritance or reversion whereof such term shall become attendant as aforesaid." It has been held that the protection to be afforded by this statute, is not merely such as might have been set up in a court of law, but such as that a court of equity would not have restrained its being so set up(*o*).

Belief of juries.

§ 399. Whether, where presumptions are made in support of peaceable or beneficial enjoyment, the jury are bound to *believe* in the fact which they find, has been made a question; and there certainly are authorities both ways(*p*). Upon the whole, it may perhaps safely be laid down that, as in all presumptions of this nature legal considerations more or less predominate, the jury

(*o*) *Doe* d. *Cadwalader* v. *Price*, 16 M. & W. 603; *Cottrell* v. *Hughes*, 15 C. B. 532; *Plant* v. *Taylor*, 7 H. & N. 211; *Owen* v. *Owen*, 3 H. & C. 88.

(*p*) See 3 Stark. Ev. 918 and 926, note (*m*), 3rd Ed.; *Doe* d. *Newman* v. *Putland*, 3 Sugd. V. & P. 61, 10th Ed., per Richards, C. B.; *Hillary* v. *Waller*, 12 Ves. 239, 252, per Sir William Grant, M. R.; *Day* v. *Williams*, 2 C. & J. 459, 460, per Bayley, B.; *St. Mary Magdalen* v. *The Attorney-General*, 3 Jurist, N. S. 675, per Lord Wensleydale.

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ought to find as directed or advised by the judge, unless the suggested fact appears absurd or grossly improbable; in either of which cases, as he ought not to direct or advise them to find such a fact, so neither ought they to find it.

Sub-Section VI.

Presumptions from the ordinary conduct of mankind, the habits of society, and the usages of trade.

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Presumptions from the ordinary conduct of mankind, &c.

Miscellaneous instances.

§ 400. The presumptions drawn from the ordinary conduct of mankind, the habits of society, and the usages of trade, are numerous; and several of them come under the head of presumptions of law. The occupation of land carries with it an implied agreement on the part of the tenant, to manage the land according to the course of good husbandry and the custom of the country (*q*). Rent paid by one who is in possession of the land out of which the rent issues, is, in the absence of evidence to the contrary, presumed to be a rent service (*r*). So, where the mere existence of a tenancy is proved, a tenancy from year to year will be presumed; and if the day of its commencement does not appear, it

(*q*) *Powley* v. *Walker*, 5 T. R. 373; *Legh* v. *Hewitt*, 4 East, 154.

(*r*) See *Hardon* v. *Hesketh*, 4 H. & N. 175.

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will be settled by the custom of the country (*s*). Leases for uncertain terms are primâ facie leases at will (*t*); but where a tenant holds over after the expiration of a term, he impliedly holds subject to all the covenants in the lease which are applicable to his new situation (*u*). Where a servant, at least a servant in husbandry, or a menial servant, is hired generally, without any stipulation as to time, the hiring will be presumed to have been for a year, unless there are circumstances to raise a presumption to the contrary (*v*). A promise to marry generally, is interpreted a promise to marry within a reasonable time (*x*); and, on proof of a regular marriage per verba de præsenti, consummation is implied (*y*). The important rule, that confessions and other forms of self-deserving evidence are receivable against the party who makes them (*z*), seems founded on this principle. To this class belong also many presumptions of knowledge. Thus a man is presumed to know what deeds he has executed (*a*), although probably in many cases the presumption is not a strong one; the members of a club (*b*), or a stock exchange (*c*), are presumed to be acquainted with its rules; and it is said that parties claiming under a lease are presumed to know the title under which they took, and the circumstances connected with it (*d*).

(*s*) Gresley, Evid. in Equity, 368.

(*t*) *Roe* d. *Bree* v. *Lees*, 2 W. Bl. 1171, 1173, per De Grey, C. J.

(*u*) *Digby* v. *Atkinson*, 4 Camp. 275; *Johnson* v. *St. Peter's, Hereford*, 4 A. & E. 520. See *Roe* d. *Jordan* v. *Ward*, 1 H. Bl. 97; and *Roberts* v. *Hayward*, 3 C. & P. 432.

(*v*) 3 Stark. Ev. 999, 3rd Ed.; Chitt. Contr. 518-519, 7th Ed.

(*x*) *Potter* v. *De Roos*, 1 Stark. 82; *Phillips* v. *Crutchley*, 3 C. & P. 178; 1 Moore & P. 239.

(*y*) *Dalrymple* v. *Dalrymple*, 2 Hagg. 54, 65, 66.

(*z*) See *infrà*, chap. 7.

(*a*) *Palmer* v. *Newell*, 2 Jurist, N. S. 268.

(*b*) *Raggett* v. *Musgrave*, 2 C. & P. 556; *Alderson* v. *Clay*, 1 Stark. 405.

(*c*) *Stewart* v. *Cauty*, 8 M. & W. 160; *Mitchell* v. *Newhall*, 15 *Id.* 309.

(*d*) *Butler* v. *Lord Portarlington*, 1 Con. & L. 24.

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Other instances.

§ 401. There are other presumptions derived from the ordinary conduct of mankind. Thus, the cancelling (*e*), or taking the seals off (*f*), a deed, or tearing a will in pieces (*g*), is primâ facie evidence of a revocation, though the presumption may be rebutted. So where a will, duly executed, remains in the custody of the testator, but cannot be found after his death, the law presumes that it has been revoked (*h*).

Date of documents.

§ 402. It may be stated as a general rule that, primâ facie, documents should be taken to have been made or written on the day they bear date (*i*). This has been held to apply to letters (*j*), bills of exchange and promissory notes (*k*), and the indorsements on them (*l*), and also to bankers' cheques (*m*). So, a deed is presumed to have been executed (*n*), and delivered (*o*), on the day it is dated. This presumption is however easily displaced, at least so far as it relates to the *precise* date; and the rule itself is subject to exceptions (*p*).

(*e*) *Alsager* v. *Close*, 10 M. & W. 576.

(*f*) Latch.226; *Price* v. *Powell*, 3 H. & N. 341.

(*g*) *In the goods of Colberg*, 2 Curt. 832.

(*h*) *Finch* v. *Finch*, L. Rep., 1 P. & D. 371.

(*i*) *Smith* v. *Battens*, 1 Moo. & Rob. 341; *Anderson* v. *Weston*, 6 Bingh. N. C. 296; *Sinclair* v. *Baggaley*, 4 M. & W. 312; *Potez* v. *Glossop*, 2 Exch. 191; *Malpas* v. *Clements*, 19 L. J., Q. B. 435; *Yorke* v. *Brown*, 10 M. & W. 78; *Morgan* v. *Whitmore*, 6 Exch. 716.

(*j*) *Hunt* v. *Massey*, 5 B. & Ad. 902; *Goodtitle* d. *Baker* v. *Milburn*, 2 M. & W. 853; *Potez* v. *Glossop*, 2 Exch. 191. See however the observations of Lord Wensleydale in *Butler* v. *Lord Mountgarrett*, 7 Ho. Lo. Cas. 633, 646.

(*k*) *Anderson* v. *Weston*, 6 Bingh. N. C. 296.

(*l*) *Smith* v. *Battens*, 1 Moo. & R. 341.

(*m*) *Laws* v. *Rand*, 3 C. B., N. S. 442.

(*n*) *Anderson* v. *Weston*, 6 Bingh. N. C. 296, 300.

(*o*) *Stone* v. *Grubbam*, 1 Rol. 3, pl. 5; *Oshey* v. *Hicks*, Cro. Jac. 263.

(*p*) *Anderson* v. *Weston*, 6 Bingh. N. C. 296, 301; *Sinclair* v. *Baggaley*, 4 M. & W. 312; *Gibson* v. *King*, Car. & M. 458; *Wright* v. *Lainson*, 2 M. & W. 739; *Edwards* v. *Crook*, 4 Esp. 39.

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Presumptions from the course of business.

In public offices.

§ 403. Many presumptions are drawn from the usual course of business in public offices. Thus, if a letter is put into a post-office, that is primâ facie proof, until the contrary appears, that the party to whom it is addressed received it in due course (*q*). By some statutes this sort of proof has been made conclusive in certain cases where the letter is registered (*r*), and in some even where it is not (*s*). Presumptions of this kind are also made from the course of business in private offices; such as those of merchants (*t*), attornies (*u*), &c.

In private offices.

Other presumptions from the usages of trade.

§ 404. There are several other presumptions drawn from the usages of trade. Thus, where a partnership is found to exist between two persons, but there is no evidence to shew in what proportions they are interested, it is to be presumed that they are interested in equal moieties (*x*). So, bills of exchange and promissory notes are presumed to have been given for consideration (*y*). And a bill of exchange, in the absence of proof to the contrary, is presumed to have been accepted within a reasonable time after its date, and before it came to maturity (*z*).

(*q*) *Kufh* v. *West*, 3 Esp. 54; *Warren* v. *Warren*, 1 C. M. & R. 250; *Kieran* v. *Johnson*, 1 Stark. 109; *Stocken* v. *Collin*, 7 M. & W. 515.

(*r*) See 6 & 7 Vict. c. 18, ss. 100 & 101; 28 Vict. c. 36, s. 9; &c.

(*s*) See 19 & 20 Vict. c. 47, ss. 53—4; 25 & 26 Vict. c. 89, ss. 62, 63, &c.

(*t*) *Hetherington* v. *Kemp*, 4 Camp. 193; *Toosey* v. *Williams*, 1 Mood. & M. 129; *Hawkes* v. *Salter*, 4 Bingh. 715; *Pritt* v. *Fairclough*, 3 Camp. 305; *Hagedorn* v. *Reid*, *Id.* 379.

(*u*) *Doe* d. *Patteshall* v. *Turford*, 3 B. & Ad. 890.

(*x*) *Farrar* v. *Beswick*, 1 Moo. & R. 527, per Parke, B.

(*y*) Byles on Bills, 2 and 108, 8th Ed.

(*z*) *Roberts* v. *Bethell*, 12 C. B. 778. For other instances see *Carter* v. *Abbott*, 1 B. & C. 444; *Houghton* v. *Gilbart*, 7 C. & P. 701; *Leuckhart* v. *Cooper*, 7 C. & P. 119; *Cunningham* v. *Fonblanque*, 6 C. & P. 44.

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Sub-Section VII.

PRESUMPTION OF THE CONTINUANCE OF THINGS IN THE STATE IN WHICH THEY HAVE ONCE EXISTED.

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Presumption of the continuance of things in the state in which they have once existed.

§ 405. It is a very general presumption, that things once proved to have existed in a particular state are to be understood as continuing in that state, until the contrary is established by evidence, either direct or circumstantial. Thus, where seisin of an estate has been shewn, its continuance will be presumed (*a*); as also will that of a parochial settlement (*b*), of the authority of an agent (*c*), &c.: and there are several instances to be found in the books, where this presumption has been held stronger than the presumption of innocence, or than those derived from the course of nature. Thus, on an indictment for libelling a man in his capacity of public officer, on proof of the prosecutor having held the office previous to the publication of the libel, his continuing to do so was presumed (*d*); and it is said that where adultery has been proved, its continuance will be presumed while the parties live under the same roof (*e*). So, although the law in general presumes

(*a*) *Wrotesley* v. *Adams*, Plowd. 193; *Smith* v. *Stapleton*, *Id.* 431; *Cockman* v. *Farrer*, T. Jones, 181.

(*b*) *R.* v. *Tanner*, 1 Esp. 304.

(*c*) See *Smout* v. *Ilbery*, 10 M. & W. 1.

(*d*) *R.* v. *Budd*, 5 Esp. 230.

(*e*) *Turton* v. *Turton*, 3 Hagg. N. R. 350.

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against insanity, yet where the fact of insanity has been shewn, its continuance will be presumed; and the proof of a subsequent lucid interval lies on the party who asserts it (*f*).

Presumption of the continuance of debts, &c.

§ 406. There are two particular cases which will require special consideration: namely, the presumption of the continuance of debts, obligations, &c. until discharged or otherwise extinguished; and the presumption of the continuance of human life. With respect to the former of these—a debt once proved to have existed is presumed to continue, unless payment, or some other discharge, be either proved, or established by circumstances (*g*). A receipt under hand and seal is the strongest evidence of payment, for it amounts to an estoppel, conclusive on the party making it (*h*); but a receipt under hand alone (*i*), or a verbal admission of payment (*k*), is in general only primâ facie evidence of it, and may be rebutted. Of the presumptive proofs of payment, the most obvious is that of no demand having been made for a considerable time; and previous to the 3 & 4 Will. 4, c. 42, s. 3, the courts, by analogy to the Statute of Limitations, had established the artificial presumption, that where payment of a bond or other specialty was not demanded for twenty years, and there was no payment of interest or other circumstance to shew that it was still in force, payment or release ought to be presumed by a jury (*l*). By that statute it is enacted, that all actions for debt for rent upon an indenture of demise, all actions of covenant or debt upon any

Presumption of payment.

3 & 4 Will. 4, c. 42, s. 3.

(*f*) Butl. Co. Litt. 246 b, note (1); Gresl. Ev. in Eq. 368; *Att.-Gen.* v. *Panther*, 3 Bro. C. C. 441; *White* v. *Wilson*, 13 Ves. 88.

(*g*) *Jackson* v. *Irvin*, 2 Camp. 50. Also in the Roman law, Cod. lib. 4, tit. 19, l. 1.

(*h*) Gilb. Evid. 158, 4th Ed.

(*i*) 1 Greenl. Ev. §§ 212 and 305, 7th Ed.

(*k*) Tayl. Ev. §§ 171 and 788, 4th Ed.

(*l*) *Oswald* v. *Legh*, 1 T. R. 270; *Washington* v. *Brymer*, Peake's Ev., App. xxv.

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bond or other specialty, and all actions of debt or scire facias upon any recognizance, shall be commenced and sued within ten years after the end of the then session of Parliament, or within twenty years after the cause of action, but not after. Independent of this statute, the fact of payment may be presumed by a jury, from lapse of time, or other circumstances which render the fact probable (*m*); as, for instance, the settlement of accounts subsequent to the accruing of the debt, in which no mention is made of it (*n*). Thus, where a landlord gives a receipt for rent due up to a certain day, all former arrears are presumed to have been paid, for it is likely that he would take the debt of longest standing first (*o*). In *Colsell* v. *Budd* (*p*) it was laid down by Lord Ellenborough, that, "after a lapse of twenty years, a bond will be presumed to be satisfied; but there must either be a lapse of twenty years, or a less time coupled with some circumstance to strengthen the presumption." In *Brembridge* v. *Osborn* (*q*), also, the same judge told the jury, that where there is a competition of evidence on the question whether a security has or has not been satisfied by payment, the possession of the uncancelled security by the claimant ought to turn the scale in his favour, since in the ordinary course of dealing the security is given up to the party who pays it (*r*). Where land is conveyed to trustees in trust to pay debts, with remainder over, payment of the debts may be presumed from long possession by the remainderman, joined with other circumstances (*s*).

(*m*) 3 Stark. Ev. 823, 3rd Ed. See *Cooper* v. *Turner*, 2 Stark. Ev. 497; *Lucas* v. *Novisilienski*, 1 Esp. 296; *Sellen* v. *Norman*, 4 C. & P. 80; *Pfiel* v. *Vanbatenberg*, 2 Camp. 439.

(*n*) *Colsell* v. *Budd*, 1 Camp. 27. See Dig. lib. 22, tit. 3, l. 26, referred to *ante*, § 320.

(*o*) Gilb. Ev. 157, 4th Ed.

(*p*) 1 Camp. 27. See *Oswald* v. *Legh*, 1 T. R. 270.

(*q*) 1 Stark. Ev. 374.

(*r*) See Dig. lib. 22, tit. 3, l. 24; and Mascard. de Prob. Concl. 477.

(*s*) *Anon.*, Vin. Abr. Ev., Q. a. pl. 7.

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Release as well as payment may be inferred from circumstances (*t*). Presumption of release.

§ 407. On the same principle, although a revocation or surrender will not be presumed (*u*), it may be inferred from circumstances. In *Doe* d. *Brandon* v. *Calvert* (*x*), where, in answer to an ejectment, the defendant set up a mortgage term made to a stranger eighteen years before, and neither accounted for his possession of it, nor proved any payment of interest under the mortgage; the judge having advised the jury to presume a surrender of the mortgage term, the verdict was set aside by the court; and Mansfield, C. J., said, "There is no circumstance here to lead to the supposition that the deed was surrendered, except the eighteen years' time; if the deed had been assigned or surrendered, the instrument whereby it had been assigned or surrendered ought to be in the possession of the plaintiff. No reason is assigned to account why it should not be there; the question is therefore whether, from the circumstance of the eighteen years only, a surrender can be presumed. I have never known any case in which a shorter time than twenty years has been held sufficient to ground the presumption of a surrender, and that is often too short a time, for many times receipts and documents may be lost. But it is enough to say that twenty years is the time prescribed by act of Parliament as a bar to an ejectment, by analogy to which the doctrine of presumption has gone, and we might as well say a presumption might be raised by five years in assumpsit, or three years in trespass, as eighteen years in ejectment." Presumption of revocation or surrender.

(*t*) *Washington* v. *Brymer*, Peake's Ev., App. xxv.; *Pickering* v. *Lord Stamford*, 2 Ves. jun. 583; *Reeves* v. *Brymer*, 6 *Id.* 516; *Motz* v. *Moreau*, 13 Mo. P. C. C. 376.

(*u*) *Moreton* v. *Horton*, 2 Keb. 483.

(*x*) 5 Taunt. 170.

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Presumption of the continuance of human life.

§ 408. We next proceed to the presumptions respecting the continuance of human life. There is certainly, in the English law, no *præsumptio juris* relative to its continuance in the abstract; and in one case the Court of Queen's Bench said, that the law did not recognize the impossibility of a person who was alive in the year 1034, being still alive in the year 1827 (*y*). The death of any party once shewn to have been alive is matter of fact to be determined by a jury; and as the presumption is in favour of the continuance of life, the onus of proving the death lies on the party who asserts it (*z*).

Presumption of death from seven years' absence.

§ 409. The fact of death may, however, be proved by presumptive as well as by direct evidence (*a*). When a person goes abroad, and has not been heard of for a long time, the presumption of the continuance of life ceases at the expiration of seven years from the period when he was last heard of (*b*). And the same rule holds generally with respect to persons who are absent from their usual places of resort, and of whom no account can be given (*c*). This is incorrectly spoken of in some books as a presumption of *law* (*d*): but it is in truth a mixed presumption, said to have been adopted by analogy to the statute 1 Jac. 1, c. 11, s. 2 (*e*),—which exempts from

(*y*) *Atkins* v. *Warrington*, 1 Chitty, Plead. 258, 6th Ed. See also *Benson* v. *Olive*, 2 Str. 920.

(*z*) *Smartle* v. *Penhallow*, 2 Lord Raym. 999; *Throgmorton* v. *Walton*, 2 Ro. 461; *Wilson* v. *Hodges*, 2 East, 312.

(*a*) *Thorn* v. *Rolff*, Dy. 185 a, pl. 65; Anders. 20, pl. 42; *Webster* v. *Birchmore*, 13 Ves. 362.

(*b*) *Hopewell* v. *De Pinna*, 2 Camp. 113; *Doe* d. *Banning* v. *Griffin*, 15 East, 293; *Lee* v. *Willook*, 6 Ves. 605; *Rust* v. *Baker*, 8 Sim. 443; *Dixon* v. *Dixon*, 3 Bro. C. C. 510; *Ommaney* v. *Stilwell*, 23 Beav. 332; *In the goods of How*, 1 Swab. & T. 53.

(*c*) *Doe* d. *Lloyd* v. *Deakin*, 4 B. & A. 433. See the judgment of Lord Ellenborough in *Doe* d. *George* v. *Jesson*, 6 East, 85; *Rowe* v. *Hasland*, 1 W. Black. 404; *Bailey* v. *Hammond*, 7 Ves. 590; *Doe* d. *France* v. *Andrews*, 15 Q. B. 756.

(*d*) See the judgment in *Nepean* v. *Doe* d. *Knight*, 2 M. & W. 894.

(*e*) This statute was repealed

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the penalties of bigamy, any person whose husband or wife shall be continually remaining beyond the seas by the space of seven years together, or whose husband or wife shall absent him or herself the one from the other by the space of seven years together, in any parts within the King's dominions, the one of them not knowing the other to be living within that time;—and the 19 Car. 2, c. 6, s. 2, respecting the lives of persons in leases, who shall remain beyond the seas, or elsewhere absent themselves in the realm for more than seven years, and who are thereupon in the absence of proof to the contrary to be deemed naturally dead(*f*). But where a party has been absent for seven years, without having been heard of, the only presumption arising is that he is dead; there is none as to the time of his death, as to whether he died at the beginning or at the end of any particular period during those seven years; and if it be important to any one to establish the precise time of such person's death, he must do so by evidence of some sort, to be laid before the jury for that purpose, beyond the mere fact that seven years have elapsed since such person was last heard of(*g*). Cases in which this presumption has come in conflict with the presumption of innocence have been already considered (*h*); and a jury may find

by 9 Geo. 4, c. 31, s. 22, which exempts from the penalties of bigamy "any person whose husband or wife shall have been continually absent from such person for the space of seven years then last past, and shall not have been known by such person to be living within that time." This statute was in its turn repealed by 24 & 25 Vict. c. 95, and re-enacted by 24 & 25 Vict. c. 100, s. 57.

(*f*) 4 Burge's Col. Law, 10, 11; Shelford's Real Property Statutes, 176, 177, 4th Ed. There are traces to be found in the books, of this sort of presumption before the statutes, (see *Thorn* v. *Rolff*, Dyer, 185 a, pl. 65; and F. N. B. 196 L.), which might possibly have been adopted by analogy to the pre-existing presumption, instead of its being copied from them.

(*g*) *Doe* d. *Knight* v. *Nepean*, 5 B. & Ad. 86; affirmed on error, 2 M. & W. 894. And see *Reg.* v. *Lumley*, L. Rep., 1 C. C. 196; *Re Phené*, L. Rep., 5 Ch. App. 139.

(*h*) *Suprà*, sect. 1, sub-sect. 3, § 334.

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the fact of death from the lapse of a shorter period than seven years, if other circumstances concur (*i*).

Presumption of survivorship where several persons perish by a common calamity.

§ 410. As connected with the subject of the continuance of human life, it remains to notice one which has embarrassed more or less the jurists and lawyers of every country. We allude to those unfortunate cases which have from time to time presented themselves, where several persons, generally of the same family, have perished by a common calamity; such as shipwreck, earthquake, conflagration, or battle; and the priority in point of time of the death of one over the rest exercises an influence on the rights of third parties. The civil law and its commentators were considerably occupied with questions of this nature, and seem to have established as a general principle (subject, however, to exceptions) that, where the parties thus perishing together were parent and child, the latter, if under the age of puberty, was presumed to have died first; but, if above that age, the rule was reversed: while in the case of husband and wife, the presumption seems to have been in favour of the survivorship of the husband (*k*). The French lawyers also, both ancient and modern, have taken much pains on this subject (*l*). All the theories that have been formed respecting it are based on the assumption that the party deemed to have survived was likely, from superior strength, to have struggled longer against death than his companion. Now even assuming that primâ facie a male would struggle longer against death than a female, a person of mature age than one under that of puberty, or very far advanced in years, the position is at best no more than a general rule: for, not only in

(*i*) 1 Greenl. Ev. § 41, 7th Ed.

(*k*) 1 Greenl. Ev. § 29, 7th Ed.; Dig. lib. 34, tit. 5.

(*l*) For the views of the old French lawyers see Burge's Colonial Law, vol. 4, chap. 1, sect. 1; and for the law of France at the present day Code Civil, liv. 3, tit. 1, chap. 1, Des Successions, §§ 720, 721, 722.

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particular instances would the superior strength or health of the party supposed to be the weaker reverse all; but the rules rest on the hypothesis, that both parties were in exactly the same situation with reference to the impending danger; whereas it is obvious that their respective situations with reference to it, must usually be unascertainable in the fury of a battle or the horrors of an earthquake or a shipwreck. And the moral condition of the parties must not be overlooked: the brave survive the fearful and the nervous. Add to this, that according to some modern physiologists, in some kinds of death the strongest perish first (*m*). However that may be, in opening the door to this class of questions, the lawyers of Rome and France lost sight of the salutary maxim "Nimia subtilitas in jure reprobatur" (*n*). The English law has judged more wisely: for, notwithstanding some questionable dicta, the true conclusion from the authorities seems to be, that it recognizes no *artificial* presumption in cases of this nature; but leaves the real or supposed superior strength of one of the persons perishing by a common calamity, to its natural weight, i. e. as a *circumstance* proper to be taken into consideration by a judicial tribunal, but which standing alone is insufficient to shift the burden of proof (*o*).

(*m*) See Beck's Med. Juris. p. 397, 7th Ed., where is related an incident furnished by a modern traveller, who, in giving an account of a caravan coming in want of water in a Nubian desert, says that "the youngest slaves bore the thirst better than the rest; and while the grown-np boys all died, the children reached Egypt in safety." The same author adds, "as to *habit* and variety of constitution, all such that have a tendency to affections of the head and lungs, should be deemed the first victims, in case the causes of death are of a description to affect these." We snbjoin the following statement, though not from a work of authority. "It seems that death from hunger occurs soonest in the young and robust, their vital organs being accustomed to greater action than those of persons past the adult age." Chambers' Pocket Miscellany, Vol. 8, p. 119.

(*n*) 4 Co. 5 b; 5 Co. 121 a; 3 Bulst. 65.

(*o*) One of the best known cases on this snbject is that of General Stanwix and his daughter, *R.* v. *Dr. Hay*, 1 W. Bl. 640. The eele-

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When therefore a party on whom the onus lies of proving the survivorship of one individual over another, has no evidence beyond the assumption that, from age or sex, that individual must be taken to have struggled longer against death than his companion, he cannot succeed. But then, on the other hand, it is not correct to infer from this, that the law presumes both to have perished at the same moment—this would be establishing an artificial presumption against manifest probability. The practical consequence is however nearly the same; because if it cannot be shewn which died first, the fact will be treated by the tribunal as a thing unascertainable, so that for all that appears to the contrary both individuals may have died at the same moment. The law, as stated above, has been fully established in the case of *Underwood* v. *Wing*, decided by the Master of the Rolls, Sir John Romilly (*p*),—whose judgment was affirmed by Lord Chancellor Cranworth, assisted by Wightman, J., and Martin, B. (*q*); and finally by the House of Lords, in the case of *Wing* v. *Angrave* (*r*).

brated Mr. Fearne composed two ingenious arguments, one in favour of each of the claimants. See his Works. There is, however, a prior case of *Hitchcock* v. *Beardsley*, West. Rep. t. Hardw. 445; and an old case of *Broughton* v. *Randall*, Cro. El. 503, where a father and son were hanged together in one cart, and the son was presumed to have survived in consequence of his appearing to struggle longer, and some other circumstances. The cases of late years have become comparatively numerous. See *Taylor* v. *Diplock*, 2 Phillim. 261; *Wright* v. *Netherwood* (or *Samuda*), 2 Phillim. 266, note (*c*); *Mason* v. *Mason*, 1 Meriv. 308; *Colvin* v. *H. M. Procurator-General*, 1 Hagg. N. S. 92; *In the goods of Selwyn*, 3 *Id.* 748; *In the goods of Murray*, 1 Curteis, 596; *Satterthwaite* v. *Powell*, *Id.* 705; *Sillick* v. *Booth*, 1 Y. & C. C. C. 117; *Durrant* v. *Friend*, 5 De Gex & S. 343; *Underwood* v. *Wing*, 4 De G., M. & G. 633, 1 Jurist, N. S. 169; &c.

(*p*) 19 Beav. 459.

(*q*) 4 De G., M. & G. 633; 1 Jurist, N. S. 169.

(*r*) 8 H. L. C. 183.

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Sub-Section VIII.

PRESUMPTIONS IN DISFAVOUR OF A SPOLIATOR.

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Maxim "Omnia præsumuntur contra spoliatorem," &c.

§ 411. Another very important and rather favourite maxim is, "Omnia præsumuntur contra spoliatorem" (*s*), or "Omnia præsumuntur in odium spoliatoris" (*t*)— a maxim resting partly on natural equity, but much strengthened by the artificial policy of law. One of the leading cases on this subject is that of *Armory* v. *Delamirie* (*u*), where a person in humble station of life having found a jewel, took it to the shop of a goldsmith to inquire its value, who, having got the jewel into his possession under pretence of weighing it, took out the stones, and on the finder refusing to accept a small sum for it, returned to him the empty socket. An action of trover having been brought to recover damages for the detention of the stones, the jury were directed that, unless the defendant produced the jewel and thereby shewed it not to be of the finest water, they should presume the strongest against him, and make the value of the best jewels that would fit the socket the measure of their damages. In the great case of *Annesley* v. *The Earl of Anglesea* (*x*), the circumstances which pressed most against the defendant were, that he had caused

Instances of its application.

(*s*) 2 Ev. Poth. 336; 1 Stark. Ev. 564, 3rd Ed.; 10 H. L. Ca. 591.

(*t*) Lofft, M. 389.

(*u*) 1 Stra. 505. See ad id. *Mortimer* v. *Craddock*, 7 Jur. 45.

(*x*) 17 Ho. St. Tr. 1140, 1430, per Mounteney, B.

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the plaintiff, who claimed the title and family estate as heir, to be kidnapped and sent to sea, and afterwards endeavoured to take away his life on a false charge of murder—facts which, one of the judges said, spoke more strongly in proof of the plaintiff's case than a thousand witnesses. In highway robbery the law, in odium spoliatoris, will presume fear whenever property is taken with such circumstances of violence or terror, or threatening by word or gesture, as would in common experience induce a man to part with his property from an apprehension of personal danger (*y*); so that, even where the prosecutor sought out the robber, and submitted to be robbed by him for the purpose of bringing him to justice, this was held to be robbery on the part of the accused (*z*). In the Roman law, although the general rule was that money paid was presumed to be in discharge of a debt, yet where a man, who was sued for a debt, denied having received the money, proof that he had in point of fact received it turned on him the burden of shewing that it was in payment of a debt (*a*). The application of the maxim to international law will be considered in another place (*b*).

Eloigning, &c. instruments of evidence, or introducing the crimen falsi into legal proceedings.

§ 412. But the most usual application of this principle is where there has been any forensic malpractice —by eloigning, suppressing, defacing, destroying, or fabricating documents, or other instruments of evidence, or introducing into legal proceedings any species of the crimen falsi. This not only raises a presumption that the documents or evidence eloigned, suppressed, &c., would, if produced, militate against the party eloigning, suppressing, &c., but procures more ready admission to the evidence of the opposite side (*c*). "If," says

(*y*) 2 East, P. C. 711.

(*z*) *Norden's case*, cited Foster, C. L. 129.

(*a*) Dig. lib. 22, tit. 3, l. 25.

(*b*) *Infrà*, sub-sect. 9.

(*c*) Ph. & Am. Ev. 458. See *Roe* d. *Haldane* v. *Harvey*, 4 Burr. 2484.

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L. C. J. Holt, "a man destroys a thing that is designed to be evidence against himself, a small matter will supply it"(*d*). This rule is evidently based on the principle, that no one shall be allowed to take advantage of his own wrong; and several instances of its application are to be found in the books. Thus, in the case of *R.* v. *The Countess of Arundel* (*e*), where the Crown was entitled at law to certain land, by reason of an attainder for high treason, a suit in equity was commenced by the attorney-general against the defendants to recover the lands; and on its being shewn that the deeds whereby the estate came to the party attainted were not extant, but were very strongly suspected to have been suppressed and withheld by some under whom the defendant claimed, a decree was made that the Crown should hold and enjoy the land till the defendant should produce the deeds, and the court thereupon take further consideration and order. So, in the case of *Harwood* v. *Goodright* (*f*), where a person who had made a will in favour of a certain party, was proved to have subsequently made another, the contents of which where unknown; Lord Mansfield said, that spoliation was a circumstance from which the jury might fairly have presumed that it was a revocation of the former will. If a man refuses, after notice, to produce an agreement, it will be presumed to have

(*d*) *Anon.*, 1 L. Raym. 731.

(*e*) Hob. 109. According to that report, there was only a vehement suspicion that the deeds had been suppressed; but, in the case of *Cowper* v. *Earl Cowper* (2 P. Wms. 749), Sir Jos. Jekyll, M. R., says, that he had caused the register book to be examined, from which it appeared, that the deeds had been proved to have been extant and duly executed. For other instances of the manner in which the spoliation of documents is dealt with by courts of equity, see the cases there cited, and also *Dalston* v. *Coatsworth*, 1 P. W. 731; *White* v. *Lady Lincoln*, 8 Ves. 363; *Blanchet* v. *Foster*, 2 Ves. sen. 264; and *The Att.-Gen.* v. *The Dean of Windsor*, 24 Beav. 679; &c.

(*f*) Cowp. 91.

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been properly stamped (*g*); and it has been held at Nisi Prius, that where a document has been fraudulently obtained by one of the parties to a suit from a witness, whose property it is, and who is called on to produce it under a subpœna duces tecum, secondary evidence of the contents of the document may be given without notice to produce the original (*h*).

Extent of the presumption against the spoliator of documents.

§ 413. It is said that the presumption against the spoliator of documents is not confined to assuming those documents to be of a nature hostile to him, and procuring a more favourable reception for the evidence of his opponent, but that it has the further effect of casting suspicion on all the other evidence adduced by the party guilty of the malpractice (*i*). "Qui semel malus, semper præsumitur esse malus eodem genere" (*k*). In the case of *Doe* d. *Beanland* v. *Hirst* (*l*), Bayley, J., is reported to have told the jury, that they were to consider the circumstance of the erasure in a certain deed; observing that a man who was capable of making an alteration in one deed might be capable of suppressing another, if within his power. And the presumption arising from the fabrication or corruption of instruments of evidence, is even stronger than that from the suppression or destruction of them (*m*).

Occasionally carried too far.

§ 414. However salutary, and in general equitable, the maxim, "Omnia præsumuntur contra spoliatorem,"

(*g*) *Crisp* v. *Anderson*, 1 Stark. 35.

(*h*) *Leeds* v. *Cook*, 4 Esp. 256.

(*i*) Phill. & Am. Ev. 458.

(*k*) Cro. Car. 317. The text of the canon law went farther, laying it down, "Semel malus, semper præsumitur esse malus." Sext. Decretal. lib. 5, tit. 12, De Reg. Jur. R. 8. But the commentators on that law seem disposed to restrict its effect to misconduct ejusdem generis. See Gibert, Corp. Jur. Can. Proleg. Pars Post. tit. 7, Cap. 2, § 2, N. 20; also Struvius, Synt. Jur. Civ. Exercit. 28, § 18, note (ζ), by Müller, and *infrà*, sect. 3, sub-sect. 1.

(*l*) 11 Price, 488.

(*m*) 1 Stark. Ev. 564, 3rd Ed.

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must be acknowledged to be, it has been made the subject of very fair and legitimate doubt whether it has not occasionally been carried too far. "The mere non-production of written evidence," says Sir W. D. Evans (*n*), "which is in the power of a party, generally operates as a strong presumption against him. I conceive that has been sometimes carried too far, by being allowed to supersede the necessity of other evidence, instead of being regarded as merely matter of inference, in weighing the effect of evidence in its own nature applicable to the subject in dispute." So, in the case of *Barker* v. *Ray* (*o*), Lord Eldon said, "This court has a peculiar jurisdiction in cases of spoliation. . . . . The jurisdiction of the court in matters of spoliation has gone a long way; indeed, it has gone to such a length that, if I did not think myself bound by authority and practice, I should have great difficulty in following them so far. To say that, if you once prove spoliation, you will take it for granted that the contents of the thing spoliated are what they have been alleged to be, may be, in a great many instances, going a great length." Even when the positive fabrication of evidence is proved against a party, tribunals, whose object is the ascertaining of truth, will consider the nature of the case, and the temptation which might have led to fabrication. Is there anything impossible in the suggestion, is it even unlikely, that in many cases the fabrication of evidence has been resorted to under the apprehension, perhaps the certain knowledge, that similar malpractice will be exercised by the other side (*p*)? Suppose a man is sued on a bond which he knows to be a forgery, but feels that it is altogether out of his power to prove it so. "Forge a release," or "Bribe a witness to prove payment" (*q*), are suggestions too obvious not to have been occasionally acted on.

(*n*) 2 Evans's Poth. 337.
(*o*) 2 Russ. 72, 73.
(*p*) 3 Benth. Jud. Ev. 168.
(*q*) *Id.* "One of the greatest

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Especially in criminal cases.

§ 415. Whatever weight may be legitimately attached to this presumption in civil cases, great care must be taken in criminal ones, where life or liberty are at stake, not to give to spoliation, or similar acts, any weight to which they are not entitled. Nations and ages differ in the tone of moral feeling diffused through society, and in their reverence for the sacredness of an oath; men differ in strength of conscientious principle, as well as in courage; and tribunals differ in ability and impartiality, and in the quantity of evidence which they exact for condemnation. Undoubtedly, the suppression or fabrication of evidence by a party accused of a crime is always a *circumstance*, frequently a most powerful one, to prove his guilt. But many instances have occurred of innocent persons, alarmed at a body of evidence against them, which, although false or inconclusive, they felt themselves unable to refute, having recourse to the suppression or destruction of criminative, and even to the fabrication of exculpatory, testimony (*r*). Sir Edward Coke relates a now well-known, but not on that account less remarkable or striking instance of this (*s*). An uncle had the bringing up of his niece, who was entitled to some landed property under her father's will, of which

and most difficult points in the Douglas cause," observes Sir W. D. Evans, "arose from Sir John Stewart having fabricated four letters, as received from La Marre, the surgeon; a conduct certainly very suspicious, and calculated to induce a strong presumption against the general veracity of his account. I believe the true conclusion, from all the circumstances in that cause, to be that which was drawn by the House of Lords in support of the filiation; but it is impossible for great doubt not to hang upon a case affected by such a circumstance." 2 Ev. Poth. 337, note (*a*).

(*r*) 1 Stark. Ev. 565, 3rd Ed.; Ph. & Am. Ev. 467. Innocent persons have occasionally endeavoured to defend themselves by setting up false alibis; and cases have probably occurred where the accused, though innocent, could not avail himself of his real defence without criminating others, whom he is anxious not to injure, or even criminating himself with respect to other transactions.

(*s*) 3 Inst. ch. 104, p. 232; cited also 2 Hale, P. C. 290; 2 Ev. Poth. 338; Wills, Circ. Evid. 82, 3rd Ed., &c.

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she would become possessed at the age of sixteen, and to which the uncle was next heir. When she was about eight or nine years old he was one day correcting her for some offence, when she was heard to say, "Oh, good uncle, kill me not!" After this time the child could not be heard of, though much inquiry was made after her; and the uncle, being committed to jail on suspicion of her murder, was admonished by the justices of assize to find out the child against the next assizes. Unable to do this, he dressed up another child to represent her; but the falsehood being detected, he was convicted and executed for the supposed murder. It afterwards appeared, however, that, on being beaten by her uncle, the niece had run away into an adjoining county, where she remained until the age of sixteen, when she returned to claim her property. "Which case," he adds, "we have reported for a double caveat: first to judges, that they in case of life judge not too hastily upon bare presumption: and, secondly, to the innocent and true man, that he never seek to excuse himself by false or undue means, lest thereby he offending God (the author of truth) overthrow himself, as the uncle did." A case is also related where, in a large company, a valuable trinket belonging to one of the party was suddenly missed. On the proposal of one of the company, all agreed to be searched, except one, who, by an obstinate refusal, drew down on himself strong suspicion. He however succeeded in obtaining a private audience of the master of the house; and on his pockets being turned inside out, there was discovered, instead of the trinket sought, a portion of eatables which he had taken to bring home to his wife, who had no means of procuring food (*t*).

(*t*) 3 Benth. Jud. Ev. 88–9.

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Sub-Section IX.

PRESUMPTIONS IN INTERNATIONAL LAW.

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Presumptions in international law.

§ 416. We propose now to consider certain presumptions to be found in international law.

Public.

§ 417. The public international law, as is well known, is adopted by the common law, and is held to be part of the law of the land (*u*). "In republicâ maximè conservanda sunt jura belli" (*x*).

Acts done by an independent sovereign who is also the subject of another state.

§ 418. Where the subject of one state is also the independent sovereign of another he is, of course, not responsible to the laws of the former state for acts done by him as such sovereign (*y*). And it seems that, in respect to any act done by such a person out of the realm of which he is a subject, or any act as to which it might be doubtful whether it ought to be attributed to the character of the sovereign prince or to that of the subject, the act ought to be presumed to have been done in the character of the sovereign prince (*z*).

(*u*) 4 Blackst. C. 67.

(*x*) 2 Inst. 58.

(*y*) *The Duke of Brunswick* v. *The King of Hanover*, 6 Beav. 1; *Wadsworth* v. *The Queen of Spain*, 17 Q. B. 171; *De Haber* v. *The Queen of Portugal*, *Id.* 196.

(*z*) *The Duke of Brunswick* v. *The King of Hanover*, 6 Beav. 57, 58.

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Presumptions in disfavour of a spoliator.

§ 419. The principle of presuming in disfavour of a spoliator (*a*) is recognized in international law (*b*), especially in those cases where papers have been spoliated by a captured party (*c*), and where neutral vessels are found carrying despatches from one part of the dominions of a belligerent power to another (*d*).

Private.

§ 420. With respect to private international law, its very existence rests on one important presumption. "In the silence of any positive rule," says Dr. Story, "affirming, or denying, or restraining the operation of foreign laws, courts of justice presume the tacit adoption of them by their own government, unless they are repugnant to its policy, or prejudicial to its interests" (*e*). So, says Professor Greenleaf, "A spirit of *comity*, and a disposition to friendly intercourse, are presumed to exist among nations as well as among individuals" (*f*).

Presumptions relating to domicil.

§ 421. There are other presumptions to be found in this branch of jurisprudence. Thus, the place of a person's birth is considered as his domicil, if it is at the time of his birth the domicil of his parents (*g*). But a more important rule is, that the place where a person lives must be taken, primâ facie, to be his domicil, until other facts establish the contrary (*h*). Where the family of a married man resides is generally to be deemed his domicil (*i*); and that of an unmarried man will be taken to be in the place where he transacts his business, exercises his profession, or assumes and ex-

(*a*) See this subject generally, *suprà*, sub-sect. 8.

(*b*) 1 Greenl. Ev. § 31, 7th Ed.

(*c*) *The Hunter*, 1 Dods. Adm. Rep. 480; *The Johanna Emilie*, 18 Jur. 703.

(*d*) *The Atalanta*, 6 Robins. Adm. R. 440.

(*e*) Story, Confl. of Laws, § 38, 5th Ed.

(*f*) 1 Greenl. Ev. § 43, 7th Ed.

(*g*) Story, Confl. of Laws, § 46, 5th Ed.

(*h*) *Id.*; *Bruce* v. *Bruce*, 2 B. & P. 229, 230, note (*a*); *Bempde* v. *Johnstone*, 3 Ves. jun. 198; *Stanley* v. *Bernes*, 3 Hagg. N. R. 437.

(*i*) Story, Confl. of Laws, § 46, 5th Ed.

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ercises municipal duties or privileges (*k*). And it is said to be a principle, that where the place of domicil is fixed or determined by positive facts, presumptions from mere circumstances will not prevail against those facts (*l*). This does not mean that presumptive evidence is inadmissible to prove domicil; and, indeed, it amounts to little more than saying that the weaker evidence shall not be allowed to prevail against the stronger.

Other presumptions.

§ 422. It is also a principle of international law that, generally speaking, the validity of a contract is to be decided by the law of the place where it is made, unless it is to be performed in another country; for in the latter case the law of the place of performance is to govern (*m*), because such may well be presumed to have been the intention of the parties (*n*). So, a foreign marriage will be presumed to have been celebrated, with the solemnities required by the law of the place where it is celebrated (*o*). And the general presumptions against crime, fraud, covin, immorality, &c. are applicable to acts done abroad.

Sub-Section X.

PRESUMPTIONS IN MARITIME LAW.

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Presumptions in maritime law.

§ 423. Among the most important presumptions in maritime law are those relating to seaworthiness.

(*k*) Story, Confl. of Laws, § 47, 5th Ed.
(*l*) *Id.*
(*m*) *Id.* § 242 (1), 280—282.
(*n*) *Id.* § 76.
(*o*) *R.* v. *The Inhabitants of Brampton*, 10 East, 282, 289, per L. Ellenborough.

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Seaworthiness.

Every ship insured on a *voyage* policy, sails under an implied warranty that she is seaworthy. It is not necessary to inquire whether the assured acted honestly and fairly in the transaction; however just and honest his intentions may have been, if he was mistaken in the fact, and the vessel was not seaworthy, the underwriter is not liable (*p*). But if a ship, shortly after sailing, turns out to be unfit for sea, without apparent or adequate cause, the burden of proof is thrown on the assured, and a jury ought to presume that the unseaworthiness existed before the commencement of the voyage (*q*); and this rule holds even though the ship encountered a violent storm, unless it can fairly be inferred that the damage resulted from the storm (*r*). The implied warranty of seaworthiness does not however, at least in general, extend to *time* policies (*s*).

Unseaworthiness.

Presumption of loss of missing ship.

§ 424. Where a vessel is missing, and no intelligence of her has been received within a reasonable time after she sailed, it shall be presumed that she foundered at sea (*t*). Thus, where a ship was insured in 1739 from North Carolina to London, with a warranty against captures and seizures, an action was brought against the underwriters, alleging the loss to have been by sinking at sea, which came on to be tried in M. T., 17 Geo. II. The only evidence, however, was that she had sailed on her intended voyage, and had never since been heard of. On this it was objected on the part of the defendant, that, as captures and seizures were excepted, it lay on the assured to prove a loss, as alleged

(*p*) Park, Ins. 332, 7th Ed.; Arn. Ins. 689, 690, 2nd Ed.; *Knill* v. *Hooper*, 2 H. & N. 277; *Douglas* v. *Scougall*, 4 Dow, 269.

(*q*) *Munro* v. *Vandam*, Park, Ins. 333, note (*a*), 7th Ed.

(*r*) *Douglas* v. *Scougall*, 4 Dow, 269; *Watson* v. *Clark*, 1 Dow, 336; *Parker* v. *Potts*, 3 Dow, 23.

(*s*) *Gibson* v. *Small*, 4 Ho. Lo. Cas. 353; *Thompson* v. *Hopper*, 6 E. & B. 172, 937; *Faucus* v. *Sarsfield*, *Id.* 192; *Biccard* v. *Shepherd*, 14 Moore, P. C. C. 471, 493.

(*t*) Park, Ins. 105, 7th Ed.; *Green* v. *Brown*, 2 Str. 1199; *Houstman* v. *Thornton*, Holt, N. P. C. 243.

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in the declaration; but Lee, C. J., said it would be unreasonable to expect evidence of that; for as every body on board was presumed to be drowned, the plaintiff had given the best proof the nature of the case admitted of; and he left the case to the jury, who found for the plaintiff (*u*). There is no precise time for this presumption, fixed either by the common or general maritime law (*x*), although the laws of some countries have peculiar provisions on the subject (*y*); but the court and jury will be guided by the circumstances laid before them, and the nature of the voyage and navigation. In order, however, to raise this presumption, it must be distinctly shewn that the ship left port bound on her intended voyage (*z*). And when no express time is fixed for the commencement of a voyage, the law implies a stipulation that it shall be commenced without unreasonable delay, and that there shall be no unnecessary deviation from it when once commenced (*a*).

Implied stipulations against delay and deviation.

Sub-Section XI.

MISCELLANEOUS PRESUMPTIONS.

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Miscellaneous presumptions.

§ 425. We now purpose to advert to some presump-

(*u*) *Green* v. *Brown*, 2 Str. 1199, 1200.

(*x*) Park, Ins. 106, 7th Ed.; *Houstman* v. *Thornton*, Holt, N. P. C. 243, per Gibbs, C. J.

(*y*) Park, Ins. 107, 7th Ed.

(*z*) *Koster* v. *Innes*, R. & M. 333; *Cohen* v. *Hinckley*, 2 Camp. 51.

(*a*) *M'Andrew* v. *Adames*, 4 M. & Scott, 517, 530, and the authorities there referred to, and Arn. Ins. 393 *et seq.*, 2nd Ed.

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tions likely to be met in practice, which have not been hitherto noticed.

Relating to real estate.

§ 426. A large number of these relate to real estate, and are for the most part *quasi præsumptiones juris*, i. e. presumptions which are almost as obligatory as presumptions of law, but which cannot be made without the intervention of a jury. Thus the soil of the sea-shore between high and low water-mark is presumed to belong to the Crown (*b*); and so is the soil at the bottom of a navigable tidal river (*c*); but where the river is not navigable, it is presumed to be the property of the owners on each side, ad medium filum aquæ (*d*). So the shore of the sea or of a tidal river, between ordinary high and low water-mark, is presumed to be extra-parochial (*e*). Whether the soil of lakes primâ facie belongs to the owners of the lands or manors on either side, ad medium filum aquæ, or to the Crown, seems a disputed point (*f*). The same principle holds in the case of a public highway,—the soil of which is taken, primâ facie, to belong to the owners of the adjoining lands, usque ad medium filum viæ (*g*); and it

(*b*) *Blundell* v. *Catterall*, 5 B. & A. 268, 304, per Bayley, J. See *The Att.-Gen.* v. *Chambers*, 4 De G., M. & G. 206; 5 Jur., N. S. 745.

(*c*) *Malcolmson* v. *O'Dea*, 10 Ho. Lo. Cas. 593, 618.

(*d*) *Carter* v. *Murcot*, 4 Burr. 2162; *R.* v. *The Inhabitants of Landulph*, 1 Moo. & R. 393; *Lord* v. *The Commissioners of Sidney*, 12 Moo. P. C. C. 473; *M'Cannon* v. *Sinclair*, 2 E. & E. 53.

(*e*) *Ipswich Dock Commissioners* v. *Overseers of St. Peter's, Ipswich*, 7 B. & S. 310; *Bridgwater Trustees* v. *Booth*, *Id.* 348; L. Rep., 2 Q. B. 4.

(*f*) *Marshall* v. *The Ullswater Steam Navigation Company*, 3 B. & S. 732; affirmed in error, 6 B. & S. 570.

(*g*) *Berry and Goodman's case*, 2 Leon. 148; *Grose* v. *West*, 7 Taunt. 39; *Anon.*, Lofft, 358; *Cooke* v. *Green*, 11 Price, 739; *Salisbury* (*Marquis of*) v. *The Great Northern Railway Company*, 5 Jur., N. S. 70; *Berridge* v. *Ward*, 10 C. B., N. S. 400; *R.* v. *The Strand Board of Works*, 4 B. & S. 526.

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also applies to the case of a private road (*h*). But, as this presumption is founded on the supposition that the road originally passed over the lands of adjoining owners (*i*), it seems that it does not apply to roads set out under inclosure acts (*j*), or to cases where the original dedication of the road can be shewn by positive evidence (*k*). And, in the case of a private road, it may be rebutted by proof of acts of ownership (*l*). Again, the lord of a manor is, primâ facie, entitled to all the waste lands within the manor (*m*); but the presumption may be rebutted by circumstances (*n*). And strips of land adjoining a road are presumed to belong to the owner of the adjoining inclosed land, and not to the lord of the manor (*o*); although this presumption also may be rebutted (*p*); and is either done away, or considerably narrowed, by proof that those strips communicated with open commons, or larger portions of land (*q*). It seems to be a *præsumptio juris* that one part of a manor is not of a different nature from the rest (*r*); and in the case of party-walls, where the quantity of land contributed by each party is unknown, the common use of the wall is primâ facie evidence that it and the land on which it is built are the undivided property of both (*s*).

§ 427. Where the terms of the grant of a several

(*h*) *Holmes* v. *Bellingham*, 7 C. B., N. S. 329.

(*i*) *R.* v. *The Inhabitants of Edmonton*, 1 M. & Rob. 32.

(*j*) *R.* v. *The Inhabitants of Edmonton*, 1 M. & Rob. 24; *R.* v. *Wright*, 3 B. & Ad. 681.

(*k*) *Headlam* v. *Headley*, Holt, N. P. C. 463.

(*l*) See *Holmes* v. *Bellingham*, 7 C. B., N. S. 329, 337.

(*m*) *Doe* d. *Earl of Dunraven* v. *Williams*, 7 C. & P. 332.

(*n*) *Simpson* v. *Dendy*, 8 C. B., N. S. 433.

(*o*) *Doe* d. *Pring* v. *Pearsey*, 7 B. & C. 304; *Steel* v. *Prickett*, 2 Stark. 463; *Scoones* v. *Morrell*, 1 Beav. 251; *Doe* d. *Barrett* v. *Kemp*, 7 Bing. 332.

(*p*) *Doe* d. *Harrison* v. *Hampson*, 4 C. P. 267.

(*q*) *Grose* v. *West*, 7 Taunt. 39.

(*r*) Co. Litt. 78 b.

(*s*) *Wiltshire* v. *Sidford*, 8 B. & C. 259, n.; *Cubitt* v. *Porter*, *Id.* 257.

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fishery are unknown, the owner of the fishery may be presumed to be the owner of the soil (*t*); but where those terms appear, and are such as to convey an incorporeal hereditament only, the presumption is destroyed (*u*). And ownership of the soil is primâ facie evidence of a right of fishery (*v*). Proof of a carriage-way is presumptive evidence of a grant of a drift-way (*w*). Where rents of small amount have been paid to the lord of a manor for a long series of years without any variation, the payment of them affords no evidence of title to the land—the presumption is, that they are quit-rents (*x*). So, an allegation of seisin primâ facie implies occupation (*y*).

Founded on the relations in which parties stand to each other.

§ 428. Several presumptions are founded on the relations in which parties stand to each other. Thus, a woman who commits felony, or perhaps misdemeanor, in company with her husband, is excused, on the presumption, (which however may be rebutted,) of her having acted under his coercion (*z*). But the rule does not extend to crimes which are mala in se, nor to such as are heinous in their character, or dangerous in their consequences (*a*). Encroachments made by a tenant are considered as annexed to his holding, unless it appears clearly that he intended them for his own

(*t*) *Duke of Somerset* v. *Fogwell*, 5 B. & C. 875, 886, per Bayley, J.; *Holford* v. *Bailey*, 8 Q. B. 1000, 1016, per Lord Denman, *Id.*, in error, 13 Q. B. 426, 444, per Parke, B. See also *Marshall* v. *The Ulleswater Steam Navigation Company*, 3 B. & S. 732; affirmed, 6 *Id.* 570; and Co. Litt. 122 b, with Hargrave's note (7).

(*u*) *Duke of Somerset* v. *Fogwell*, 5 B. & C. 875.

(*v*) See *Mayor, &c. of Carlisle* v. *Graham*, L. Rep., 4 Ex. 361, 368; 3 Stark. Ev. 1253, 3rd Ed.

(*w*) *Ballard* v. *Dyson*, 1 Taunt. 179.

(*x*) *Doe* d. *Whittick* v. *Johnson*, Gow, N. P. C. 173—174, per Holroyd, J.

(*y*) *Stott* v. *Stott*, 16 East, 351. See *Clayton* v. *Corby*, 2 G. & Dav. 174; *England* v. *Wall*, 10 M. & W. 699.

(*z*) See the authorities collected in Arch. Plead. Crim. pp. 18, 19, 15th Ed.; Roscoe's Cr. Evid. 937—939, 5th Ed.

(*a*) *Id.*

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benefit, and not to hold them as he held the farm to which they are adjacent (*b*). It is also a maxim, "In præsumptione legis, judicium redditur in invitum" (*c*).

In contracts.

§ 429. In the case of contracts between individuals, there are many presumptions of law based on policy and general convenience. Thus, it is a conclusive presumption of law, that an instrument under seal has been given for consideration; and this presumption can only be removed by impeaching the instrument for fraud (*d*). But there is a remarkable exception to this rule, i. e. where an instrument under seal operates in restraint of trade, in which case a real consideration must appear (*e*). So, although in the case of contracts not under seal a consideration is not in general presumed (*f*), it is otherwise in the case of bills of exchange and promissory notes (*g*).

Affecting common carriers.

§ 430. Where goods entrusted to a common carrier, to be carried for reward, are lost otherwise than by the act of God or the Queeen's enemies, it is a *præsumptio juris et de jure* that they were lost by negligence, fraud, or connivance on his part (*h*). By the act of God is meant storms, lightning, floods, earthquakes, and such other things as cannot happen by the intervention of man (*i*); and under the head of the Queen's enemies must be understood public enemies, with whom the

(*b*) *Doe* d. *Lewis* v. *Rees*, 6 C. & P. 610; *Doe* d. *The Earl of Dunraven* v. *Williams*, 7 C. & P. 332; *Andrews* v. *Hailes*, 2 E. & B. 349; *Doe* d. *Croft* v. *Tidbury*, 14 C. B. 304; *Kingsmill* v. *Millard*, 11 Exch. 313; *Earl of Lisburne* v. *Davies*, L. Rep., 1 C. P. 259.

(*c*) Co. Litt. 248 b; 5 Co. 28 b; 10 Co. 94 b. See *infrà*, chap. 9.

(*d*) Bk. 2, pt. 3, § 220.

(*e*) See Chitty on Con. 8th Ed. 615, where most of the cases are referred to.

(*f*) *Rann* v. *Hughes*, 7 T. R. 350, note.

(*g*) *Suprà*, sect. 1, sub-sect. 1, § 314.

(*h*) Bull. N. P. 70, n. (*a*); *Palmer* v. *The Grand Junction Railway Company*, 4 M. & W. 749; &c.

(*i*) Bull. N. P. 70, n. (*a*).

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nation is at open war (*j*); so that robbery by a mob, irresistible from their number, would be no excuse for the bailee (*k*). This is an extremely severe presumption, but one which public policy appears to require; although both by the common law, and by virtue of various modern statutes, common carriers can, in many cases, limit their liability (*l*). So, in the case of innkeepers, before the 26 & 27 Vict. c. 41, — which has considerably modified their liability — where the goods of a traveller brought into an inn were lost, it was presumed to be through negligence in the innkeeper; and the law cast on him the onus of rebutting this presumption (*m*). "Rigorous as this law" (i. e. the law respecting innkeepers) "may seem," says Sir William Jones (*n*), "and hard as it may actually be in one or two particular instances, it is founded on the great principle of public utility, to which all private considerations ought to yield; for travellers, who must be numerous in a rich and commercial country, are obliged to rely almost implicitly on the good faith of innholders, whose education and morals are usually none of the best, and who might have frequent opportunities of associating with ruffians or pilferers, while the injured guest could seldom or never obtain legal proof of such combinations, or even of their *negligence*, if no actual fraud had been committed by them." In this, as in many other instances of legal presumption, we may detect the application of the maxim "Multa in jure communi contra rationem disputandi, pro communi utilitate introducta sunt" (*o*).

Affecting innkeepers.

Maxim.

(*j*) Story, Bailm. § 489, 5th Ed.

(*k*) *Coggs* v. *Bernard*, 2 L. Raym. 909, 918, per Holt, C. J.

(*l*) See 11 Geo. 4 & 1 Will. 4, c. 68; 17 & 18 Vict. c. 31; also Story, Bailm. §§ 553 *et seq.*

(*m*) Story, Bailm. §§ 472, 473, 5th Ed.; *Armistead* v. *Wilde*, 17 Q. B. 261; *Cashill* v. *Wright*, 6 E. & B. 891.

(*n*) Jones on Bailments, 95, 96, 4th Ed.

(*o*) Co. Litt. 70 b.

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Section III.

PRESUMPTIONS AND PRESUMPTIVE EVIDENCE IN CRIMINAL LAW.

Design of this section.

§ 431. The subject of presumptions and presumptive evidence in criminal law requires a separate consideration. In the present section we accordingly propose to treat,

1. Presumptions in criminal law.
2. Presumptive proof in criminal cases.
3. The principal forms of inculpatory presumptive evidence in criminal proceedings.

Sub-Section I.

PRESUMPTIONS IN CRIMINAL LAW.

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Legal presumptions in criminal jurisprudence.

§ 432. The introduction of legal presumptions into criminal jurisprudence presents a question of some difficulty. Although no person ought to be condemned in a court of justice unless the tribunal really and actually believes in his guilt, yet even here the principle of legal presumption may, with due discretion, be advantageously resorted to for the protection alike of the community and the accused. And accordingly we find, that not only are the general presumptions of law recognized in criminal jurisprudence, but that it has peculiar presumptions of

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its own. The universal presumption of acquaintance with the penal law (*p*), and the maxim "res judicata pro veritate accipitur" (*q*), exist there in full force. Ignorance of any law which has been duly promulgated cannot be pleaded in a criminal court: and a person who has once been tried for an offence, under circumstances where his safety was in jeopardy by the proceedings, cannot, if acquitted, be tried again for that offence, whatever new arguments to prove his guilt may be discovered, or whatever fresh proofs of it may come to light.

Criminal intent presumed from certain acts.

§ 433. A criminal intent is often presumed from acts which, morally speaking, are susceptible of but one interpretation. When for instance a party is proved to have laid poison for another, or to have deliberately struck at him with a deadly weapon, or to have knowingly discharged loaded firearms at him, it would be absurd to require the prosecutor to shew that he intended death or bodily harm to that person. So, where a baker delivered adulterated bread for the use of a public asylum, it was held unnecessary to allege that he intended it to be eaten, as the law would imply that from the delivery (*r*). The setting fire to a building is evidence of an intent to injure the owner, although no motive for the act be shewn (*s*); and the uttering a forged document is conclusive of an intent to defraud the person who would naturally be affected by it, which inference is not removed by that party swearing that he believes the accused had no such intention (*t*). By 24 & 25 Vict. c. 98, s. 44, which replaces with amendments the former statute 14 & 15 Vict. c. 100, s. 8, it

(*p*) Introd. part 2, § 45, and *suprà*, sect. 2, sub-sect. 1.

(*q*) Introd. part 2, § 44, and *infrà*, ch. 9.

(*r*) *R.* v. *Dixon*, 3 Mau. & S. 11.

(*s*) *R.* v. *Farrington*, R. & R. C. C. 207.

(*t*) *R.* v. *Sheppard*, R. & R. C. C. 169. See also *R.* v. *Mazagora*, *Id.* 291; *R.* v. *Nash*, 2 Den. C. C. 493.

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is enacted, that "it shall be sufficient, in any indictment for forging, altering, uttering, offering, disposing of, or putting off any instrument whatsoever, where it shall be necessary to allege an intent to defraud, to allege that the party accused did the act with intent to defraud, without alleging an intent to defraud any particular person; and on the trial of any such offence it shall not be necessary to prove an intent to defraud any particular person, but it shall be sufficient to prove that the party accused did the act charged with an intent to defraud." Where a party deliberately publishes defamatory matter, malice will be presumed (*u*). In such cases *res ipsa in se dolum habet* (*x*)—the facts speak for themselves. Presumptions of this kind are so conformable to reason, that moral conviction and legal intendment are here in perfect harmony. But the safety of society, joined to the difficulty of proving psychological facts (*y*), renders imperatively necessary a presumption which may seem severe; viz., that which casts on the accused the onus of justifying or explaining certain acts primâ facie illegal. It is partly on this principle that sanity is presumed in preference to innocence (*z*). So, a party who is proved to have killed another is presumed in the first instance to have done it maliciously, or at least unjustifiably; and, consequently, all circumstances of justification or extenuation are to be made out by the accused, unless they appear from the evidence adduced against him (*a*).

(*u*) *Haire* v. *Wilson*, 9 B. & C. 643.

(*x*) Bonnier, Traité des Preuves, §§ 676, 677.

(*y*) "Comen erudition est que l'entent d'un home ne serra trie, car le Diable n'ad conusance de l'entent de home;" per Brian, C. J., P. 17 Edw. IV. 2 A. pl. 2. See however that case.

(*z*) 2 Ev. Poth. 332; Answer of the Judges to the House of Lords, 8 Scott, N. R. 595, 601; 1 Car. & K. 134, 135. See *suprà*, sect. 1, sub-sect. 3, § 332.

(*a*) Fost. Cr. Law, 255, 290. It may be a question, whether this presumption holds in cases of suicide, where the only fact established before a coroner's jury is

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Criminal intent transferred from one act to another.

§ 434. A criminal intent is sometimes transferred by law from one act to another, the maxim being "In criminalibus sufficit generalis malitia intentionis cum facto paris gradus" (*b*). A., maliciously discharging a gun at B., kills C.; A. is guilty of murder, for the malice is transferred from B. to C. (*c*). And the same holds where poison laid by A. for B. is accidentally taken by C. (*d*). It is on this principle that a party who accidentally kills himself in the attempt to murder another is deemed felo de se (*e*).

Presumption of higher degree of guilt.

§ 435. In some cases the law goes farther, and attaches to acts criminal in themselves, a degree of guilt higher than that to which they are naturally entitled. It was on this principle that the entering into

that the deceased put a period to his own existence, and there is no evidence as to the state of his mind at the time. The following reasons seem to shew that the presumption does not apply in such cases. First, the *principle* fails. The presumption of malice from slaying is only a rebuttable presumption, adopted on the ground that to call on a *living* person to justify a homicide may be very advisable on grounds of public policy, and can work no hardship to the accused: — an argument wholly inapplicable to the case of a person who, being no more, cannot be called on to justify or explain anything. Secondly, presumptions ought to be based on what usually and generally exists. In many, probably most, cases of suicide mental alienation, in some form or other, is present; in murder it is quite otherwise. Thirdly, the man who commits murder under the impression that he may do so with impunity, has only moral and religious feelings to subdue; he who destroys himself has also to struggle against the primary law of nature — self-preservation. And lastly, there seems no good reason why the law should in this case lose sight of its own maxim, "Nemo præsumitur esse immemor suæ æternæ salutis, et maximè in articulo mortis." (6 Co. 76 a.) The laws of some countries, we believe, have established it as a præsumptio juris et de jure that all suicides are insane.

(*b*) Bacon, Max. Law, Reg. 15. See also 3 Inst. 51.

(*c*) 1 East, P. C. 230; *R.* v. *Smith*, 1 Dearsl. C. C. 559.

(*d*) Plowd. 474; 1 East, P. C. 230.

(*e*) 1 Hale, P. C. 413; 1 East, P. C. 230.

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measures for deposing or imprisoning the king, was held to be an overt act of compassing his death (*f*). So, if a man, without justification, assaults another with the sole intention of giving him a slight beating, and death ensues, he is held to be guilty of homicide (*g*). And if several persons go out with the intention of committing a felony, and in the prosecution of the general design one of them commits any other felony, all are accountable for it (*h*).

Maxim "Qui semel malus, semper præsumitur esse malus eodem genere."

§ 436. The presumptions in the two preceding articles are particular cases of the maxim "Qui semel malus, semper præsumitur esse malus eodem genere" (*i*), another instance of which has been already given (*k*). But the foregoing applications of it, especially the second, have been attacked by some modern writers as repugnant to natural justice and humanity (*l*); as well as to the passages of the Roman law, "In maleficiis voluntas spectatur, non exitus" (*m*), "Fraudis interpretatio semper in jure civili non ex eventu duntaxat, sed et consilio quoque desideratur" (*n*). But it may well be doubted whether these passages, standing as they do in the Digest without context, mean to express more than the unquestionable principle that there can be no crime where there is no criminal intention; or, as our own law has it, "Actus non facit reum nisi mens sit rea" (*o*). And so far from being at variance with natural justice or humanity, the maxim in question seems a principle of general jurisprudence, and is founded in true morality and policy. The principle is recognized in the laws of

(*f*) Fost. Cr. Law, 195—6.
(*g*) 4 Blackst. C. 200.
(*h*) 1 Hale, P. C. 439.
(*i*) Cro. Car. 317.
(*k*) *Suprà*, sect. 2, sub-sect. 8, § 413.
(*l*) Benth. Jud. Ev. bk. 5, ch. 4; Phillimore, Principles and Maxims of Jurisprudence, 43.
(*m*) Dig. lib. 48, tit. 8, l. 14.
(*n*) Dig. lib. 50, tit. 17, l. 79.
(*o*) Bk. 1, pt. 1, § 96.

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France (*p*) and Louisiana (*q*), and, it is said, of China also (*r*); and, in some cases at least, by the Roman law (*s*); while the maxim in terms is found in the canon law (*t*), and is thus ably explained by one of the commentators upon it. "'Semel malus, semper præsumitur malus.' Regula videtur contraria charitati, quæ non cogitet malum, sed non est; non enim charitatis est malum non cogitare in omni casu, sed tantùm, cum nullum subest fundamentum, quale subest in casu regulæ; præterea non præsumitur hic malus in omni mali genere, sed in eo tantùm, in quo malus inventus est, idque solum, ut impediatur ne simile malum perpetret; unde hæc præsumptio non obest, sed potius prodest ei in quem cadit: uno verbo præsumptio de quâ regula, non est maligna, sed cauta, utpote non nata ex pravâ malè judicandi consuetudine, aliove vitio, sed ex justo

(*p*) The following exposition of the French law on this subject may not be deemed misplaced. "Souvent la loi pénale conclut *à priori*, de l'existence de certains faits qui rendent le délit vraisemblable, à l'existence même du délit. Mais la légitimité d'une présomption aussi grave est subordonnée à deux conditions: 1°, que le fait constaté emporte certitude morale du fait incriminé par la loi; 2°, que le fait constaté soit lui-même imputable. Ces deux conditions se trouvent réunies dans le cas prévu par l'article 61 du Code pénal, qui punit, comme complices des malfaiteurs exerçant des violences contre la paix publique, ceux qui, connaissant leur conduite criminelle, leur fournissent habituellement une retraite. Le fait de loger habituellement les malfaiteurs rend éminemment vraisemblable une coupable association. Ce fait est parfaitement imputable; la loi, en le frappant, ne fait qu'aggraver la pénalité d'un acte déjà répréhensible en lui-même. C'est là de la rigueur peut-être; mais ce n'est pas de l'iniquité. On peut justifier de même la disposition de la loi du 21 Brumaire, an v. (tit. III. art. 2), qui répute coupable de trahison tout militaire qui, en présence de l'ennemi, aura poussé des clameurs tendant à jeter l'épouvante et le désordre dans les rangs. La vraisemblance d'une intelligence criminelle avec l'ennemi, justifie l'application de la peine capitale à un fait qui, par lui-même, est déjà d'une extrême gravité:" Bonnier, Traité des Preuves, § 674.

(*q*) Crim. Code of Louisiana, § 41.

(*r*) Benth. Jud. Ev. bk. 5, ch. 4.

(*s*) See Dig. lib. 47, tit. 10, l. 18, § 3.

(*t*) Sext. Decretal. lib. 5, tit. 12, de Reg. Jur. Reg. 8.

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metu" (*u*). No considerations of policy can justify the condemnation of a man who is either innocent, or of whose guilt any reasonable doubt exists; but it is very different where there is a proved basis of guilty intention to work on. There a man is rightly held accountable for the natural consequences of his misconduct, though he may not have intended them; and perilous indeed would it be to the community were this otherwise. The enormity of an offence is made up not only of the actual amount of mischief done by the criminal, but of the tendency of his conduct to encourage others to break the law; and in measuring this latter, regard must be had to the notorious difficulty of proving psychological facts. Look at the cases already put (*x*). A man, without justification, assaults another with the sole intention of giving him a slight beating; death ensues; ought a judicial tribunal to permit him to contend that he was not responsible for homicide? So, if several persons go out with the intention of committing a felony, surely the law is perfectly justified, in holding each responsible for all acts done by his companions in furtherance of the general design. For not only was the person who did the act encouraged in, if not instigated to, his guilt by the presence of the rest; but when several persons are involved in such a transaction, it is often extremely difficult to apportion to each his precise share of guilty intention; and, if the onus of doing this with accuracy were cast upon the law, the most wicked and cunning criminals would frequently escape their just punishment.

Statutory presumptions in criminal law.

§ 437. Many artificial presumptions have from time to time been introduced by statute into our criminal code. An instance is presented in the well-known

(*u*) Gibert. Corp. Jur. Can. Proleg. Pars Post. tit. 7, cap. 2, § 2, N. 20.
(*x*) § 435.

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statute 21 Jac. 1, c. 27 (*y*), by which it was enacted that any woman delivered of a bastard child, who should endeavour to conceal its birth, should be deemed to have murdered it, unless she proved it to have been born dead. This reproach to our legislation has been removed by 43 Geo. 3, c. 58, s. 3. So, the 11 Geo. 4 & 1 Will. 4, c. 66, s. 12, (repealed by 24 & 25 Vict. c. 95, and re-enacted by 24 & 25 Vict. c. 98, s. 13,) renders it felony for any person to purchase, receive, or have in his custody or possession, without lawful excuse, any forged bank note, or other forged document of the nature therein specified, knowing the same to be forged, and enacts that the proof of lawful excuse shall lie on the party accused.

Presumptions for the protection of accused persons.

§ 438. Some presumptions of the criminal law are for the protection of accused persons. Thus, an infant under seven years of age is conclusively presumed incapable of committing felony (*z*); between the ages of seven and fourteen the presumption exists, but may be rebutted by evidence (*a*): and a boy under fourteen is conclusively presumed incapable of committing a rape as principal in the first degree (*b*).

(*y*) See Introd. pt. 2, § 46.

(*z*) 4 Blackst. Com. 23; 1 Hale, P. C. 27—8.

(*a*) 4 Blackst. Com. 23; 1 Hale, P. C. 26—7.

(*b*) *Id.* 212; and 1 Hale, P. C. 630.

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Sub-Section II.

PRESUMPTIVE PROOF IN CRIMINAL CASES GENERALLY.

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Rules regulating the *admissibility* of

§ 439. The rules regulating the *admissibility* of evidence are, in general, the same in civil and criminal

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proceedings (*c*); and although presumptive evidence is receivable to prove almost any fact (*d*), the necessity for resorting to it is more frequent in the latter than in the former. The most heinous offences are usually committed in secret,—visible proofs of works of darkness must not be expected;—and accordingly direct testimony against criminals is rarely attainable, except in those cases where one of several delinquents denounces his companions at the bar of justice. We do not mean that, for want of legitimate evidence, the law condemns and punishes on that which is inferior or less conclusive —quite the reverse. A chain of presumptive evidence often affords proof quite as convincing as the testimony of eye-witnesses (*e*); and as in criminal trials the interests at stake are greater, and the consequences of error infinitely more serious, a higher degree of assurance is required for condemnatory decision than in civil proceedings, where the mere preponderance of probability is sufficient ground for adjudication (*f*).

evidence the same in civil and criminal proceedings. Necessity for resorting to presumptive proof more frequent in the latter.

§ 440. While all attempts to reduce the credibility of evidence to fixed degrees must ever be deprecated as absurd and mischievous, the experience of past ages would indeed be thrown away, if it did not point out the principal quicksands and dangers to be avoided, when dealing with the serious question of the guilt or innocence of persons charged with crime. Numerous rules have from time to time been suggested for the guidance of tribunals in this respect, among which the following are the soundest in principle, and most generally recognized in practice:

Rules of proof in criminal cases.

1°. Applicable in all cases.

1. The onus of proving everything essential to the establishment of the charge against the accused lies on the prosecutor (*g*).

(*c*) See bk. 1, pt. 1, § 94.
(*d*) Chap. 1, § 295.
(*e*) *Id.* § 296.
(*f*) Bk. 1, pt. 1, § 95.
(*g*) *Supra*, sect. 2, sub-sect. 3, § 346.

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2. The evidence must be such as to exclude to a moral certainty every reasonable doubt of the guilt of the accused (*h*).

3. In matters of doubt it is safer to acquit than to condemn; for it is better that several guilty persons should escape than that one innocent person should suffer (*i*).

Best on Presumptions § 215

2°. When the proof is presumptive.

§ 441. The above hold universally; but there are two others peculiarly applicable when the proof is presumptive.

1. There must be clear and unequivocal proof of the corpus delicti.

I. *There must be clear and unequivocal proof of the corpus delicti* (*k*). Every criminal charge involves two things: first, that an offence has been committed; and secondly, that the accused is the author, or one of the authors, of it. "I take the rule to be this," says Lord Stowell in his judgment in *Evans* v. *Evans* (*l*), —"If you have a criminal fact ascertained, you may then take presumptive proof to shew who did it;—to fix the criminal, having then an actual *corpus delicti* * * *; but to take presumptions in order to swell an equivocal fact, a fact that is absolutely ambiguous in its own nature, into a criminal fact, is a mode of proceeding of a very different nature, and would, I take it, be an entire misapplication of the doctrine of presumptions." Sir Matthew Hale, also, in his Pleas of the Crown (*m*), laid down the two following rules, which have met with deserved approbation. "I would never convict any person for stealing the goods *cujusdam ignoti*, merely because he would not give an account how he came by

(*h*) Bk. 1, pt. 1, § 95.

(*i*) Introd. pt. 2, § 49, and bk. 1, pt. 1, § 95.

(*k*) *R.* v. *Burdett*, 4 B. & A. 95, 123 and 162; Wills, Circ. Evid. 156, 3rd Ed.; *Evans* v. *Evans*, 1 Hagg. Consist. Rep. 35, 105; Burnett's Crim. Law of Scotland, 529; D'Aguesseau (Œuvres), tom. 4, pp. 422—3, 456. "Diligenter cavendum judici, ne supplicium præcipitet, antequam de crimine constiterit:" Matth. de Crim. ad Dig. lib. 48, tit. 16, c. 1, N. 2.

(*l*) 1 Hagg. Cons. Rep. 35, 105.

(*m*) 2 Hale, P. C. 290.

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them, unless there were due proof made that a felony was committed of these goods. I would never convict any person of murder or manslaughter, unless the fact were proved to be done, or at least the body found dead" (*n*). And in Starkie on Evidence (*o*) it is stated to be "an established rule, upon charges of homicide, that the accused shall not be convicted unless the death be first distinctly proved, either by direct evidence of the fact, or by inspection of the body." Such is the language of these eminent authorities. But the general principles they lay down must be taken with considerable limitation; and, in order to treat the subject with accuracy, it is to be remarked, that in some offences the evidence establishing the existence of the crime also indicates the criminal, while in others the traces or effects of the crime are visible, leaving its author undetermined: —the former being denominated by foreign jurists "delicta facti transeuntis," and the latter "delicta facti permanentis" (*p*). Under the former, i. e. delicta facti transeuntis, are ranged those offences the essence of which consists in intention; such as various forms of treason, conspiracy, criminal language, &c.; all which, being of an exclusively psychological nature, must necessarily be established by presumptive evidence (*q*), unless the guilty party chooses to make a plenary confession (*r*). To these must be added the crime of adultery, respecting which Lord Stowell himself, in other places, lays down as a fundamental rule, that it is not

1. Delicta facti transeuntis.

(*n*) The coincidence between this and the following is observable—"De corpore interfecti necesse est, ut constet. * * * Si quis fassus se furem, confessio hæc non obest, nisi constet etiam in specie de rebus furto subtractis:" Matthæus, de Prob. cap. 1, N. 4.

(*o*) 1 Stark. Ev. 575, 3rd Ed.; *Id.* 862, 4th Ed.

(*p*) Bonnier, Traité des Preuves, § 56; Case of Capt. Green and his Crew, 14 Ho. St. Tr. 1230.

(*q*) 3 Benth. Jud. Ev. 5; *R.* v. *Burdett*, 4 B. & A. 95, 122; Bonnier, Traité des Preuves, § 56; see Introd. pt. 1, § 12.

(*r*) *Infrà*, ch. 7.

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necessary to prove the fact by direct evidence (*s*); but that it is enough to prove such proximate circumstances as, by former decisions, or their own nature and tendency, satisfy the legal conviction of the court that the criminal act has been committed (*t*). By the canon law of this country, however, this crime could not be proved by the unsupported confession (however plenary) of the party:—a rule established to prevent persons getting rid of the matrimonial tie through the means of pretended adultery (*u*).

2. Delicta facti permanentis.

§ 442. In the other sort of cases—delicta facti permanentis: or, as they have been sometimes termed, delicta cum effectu permanente (*x*),—the proof of the crime is separable from that of the criminal. Thus the finding a dead body, or a house in ashes, may indicate a crime, but does not necessarily afford any clue to the perpetrator. And here, again, a distinction must be drawn relative to the effect of presumptive evidence. The corpus delicti, in cases such as we are now considering, is made up of two things: first, certain facts, forming its basis; and, secondly, the existence of criminal agency as the cause of them (*y*). It is with respect to the former of these that the general principles of Lord Stowell and Sir Matthew Hale especially apply,—the established rule being, that the facts which form the basis of the corpus delicti ought to be proved, either by direct testimony, or by presumptive evidence of

Facts forming basis of corpus delicti.

(*s*) *Loveden* v. *Loveden*, 2 Hagg. Cons. Rep. 1; *Williams* v. *Williams*, 1 *Id.* 299. See to the same effect, Ayl. Parerg. Jur. Canon. Angl. 45; Mascard. de Prob. Quæst. 10, N. 16; and Concl. 57—65; Sanchez de Matrimonio, lib. 10, Disput. 12, N. 40.

(*t*) *Williams* v. *Williams*, 1 Hagg. Cons. Rep. 299, 300.

(*u*) See the judgment of Lord Stowell in *Mortimer* v. *Mortimer*, 2 Hagg. Cons. Rep. 310, 316; and *infrà*, ch. 7, sect. 3, sub-sect. 3.

(*x*) 14 Ho. St. Tr. 1230.

(*y*) "Constare (crimen) non dicitur, simul atque de facto constiterit: etiam de dolo et causâ facti liquere debet:" Matth. de Crimin. ad Dig. lib. 48, tit. 16, c. 1, N. 2. See also Bonnier, Traité des Preuves, § 56.

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the most cogent and irresistible kind; or by a clear and unsuspected confession of the party (*z*). This is particularly necessary in cases of murder, where the maxim laid down by Sir Matthew Hale seems to have been generally followed: namely, that the fact of death should be shown, either by witnesses who were present when the murderous act was done, or by proof of the dead body, or some portion of the dead body, having been seen (*a*); or, if the body is in a state of decomposition, or reduced to a skeleton, or for any other reason the portion of it seen is in such a state as to render identification by inspection impossible, it should be identified by dress or circumstances (*b*).—"Liquere debet hominem esse interemptum" (*c*).

§ 443. This rule rests on principles which have their foundation in the deepest equity and soundest policy. In the first place, when the crime is separable from the person of the criminal many sources of error are intro- Principles on which this rule is founded.

(*z*) See *infrà*, ch. 7.

(*a*) The practice of simulating death to attain particular objects is common in the East. See Family Library: Sketches of Imposture, Deception and Credulity, ch. 9, p. 139. "When some officers in India were breakfasting in the commander's tent, the body of a native, said to have been murdered by the sepoys, was brought in and laid down. The crime could not be brought home to any one of them, yet there was the body. A suspicion, however, crossed the adjutant's mind, and, having the kettle in his hand, a thought struck him that he would pour a little boiling water on the body. He did so; on which the murdered remains started up and scampered off." No authority is cited.

(*b*) In *R.* v. *Cleves*, 4 C. & P. 221, the skeleton of a man was, after a lapse of twenty-three years, identified by his widow, from some peculiarity about the teeth. A carpenter's rule and a pair of shoes found with his remains were also identified. When a skeleton is found, it frequently becomes of the utmost importance to determine whether it is that of a male or female, of a young or old person. For full information on this subject the reader is referred to Beck's Med. Juris. p. 539 *et seq.* 7th Ed., where several cases illustrative of the necessity of attending to it are given.

(*c*) D'Aguesseau (Œuvres), tom. 4, p. 456.

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duced which do not exist in the opposite case. 1. A given event, the origin of which is unascertained, may be the result of almost innumerable causes, having their source either in accident or the agency of other persons. 2. The danger of rashly inferring the guilt of a suspected person from inconclusive circumstances, may be aggravated by his own imprudence, or even by his criminal agency in other matters. 3. In witnesses and tribunals, the love of the marvellous and the desire to detect great crimes committed in secret. 4. The facility afforded by the preceding causes to false accusations against persons who are disliked. In the second place, the conviction of a man for an imaginary offence is a scandal to the administration of justice, and an injury to society, infinitely greater than an erroneous conviction for an offence really committed (*d*).

Sound policy of.

§ 444. The sound policy of this rule is fearfully established by some old cases. A very celebrated one, related by Sir Edward Coke, has been already given under the head of presumptions made in disfavour of the spoliator (*e*). Sir Matthew Hale also mentions an instance, where a man was missing for a considerable time, and there was strong ground for presuming that another had murdered him and consumed the body to ashes in an oven. The supposed murderer was convicted and executed; after which the other man returned from sea, where he had been sent against his will by the accused, who, though innocent of murder, was not entirely blameless (*f*). There is also the case of a man named John Miles, who was executed for the murder of his friend, William Ridley, with whom he had been last seen drinking, and whose body was not found until after the execution of Miles. The deceased

(*d*) See Introd. pt. 2, § 49, and note (*q*) there.

(*e*) *Supra*, sect. 2, sub-sect. 8, § 415.

(*f*) 2 Hale, P. C. 290.

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had, while in a state of intoxication, fallen into a deep privy, where no one thought of looking for him (*g*). This rule is said to have been carried so far, that where the mother and reputed father of a bastard child were observed to strip and throw it into the dock of a seaport town, subsequently to which the body of the infant was never seen, Gould, J., who tried the father and mother for the murder, advised an acquittal, on the ground that as the tide of the sea flowed and reflowed into and out of the dock, it might possibly have carried out the *living* infant (*h*).

Proof of murder by eye-witnesses.

§ 445. Where, however, the fact of the murder is proved by eye-witnesses, the inspection of the dead body may be dispensed with; as is well illustrated by the case of *R.* v. *Hindmarsh* (*i*). There, the prisoner, a seaman, was charged with the murder of his captain. The first count of the indictment alleged the murder to have been committed by blows from a large piece of wood, and the second by throwing the deceased into the sea. It appeared in evidence that, while the ship was lying off the coast of Africa, with other vessels near, the prisoner was seen one night to take the captain up and throw him into the sea, after which he was never heard of; while, near the place on the deck where the captain was seen, was found a billet of wood, and the deck and part of the prisoner's dress were stained with blood. On this, it was objected by the prisoner's counsel that the corpus delicti was not proved, as the captain might have been taken up by some of the neighbouring vessels; citing Sir Matthew Hale and the case before Gould, J. The court, consisting of the judge of the Ad-

(*g*) Theory of Presumptive Proof, Append. case 5. See also the case of Antoine Pin, 5 Causes Célèbres, 449, Ed. Richer, Amst. 1773.

(*h*) Per Garrow, arguendo, in *R.* v. *Hindmarsh*, 2 Leach, C. L. 569, 571.

(*i*) 2 Leach, C. L. 569.

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miralty, Ashhurst, J., Hotham, B., and several doctors of the civil law, admitted the general rule of law; but Ashhurst, J., who tried the case, left it to the jury, upon the evidence, to say whether the deceased was not killed before his body was cast into the sea; and the jury having found in the affirmative, the prisoner was convicted, which conviction was afterwards held good by all the judges.

Whether, in extreme cases, basis of corpus delicti provable by presumptive evidence.

§ 446. Whether it is competent, even in extreme cases, to prove the basis of the corpus delicti by presumptive evidence, has been questioned. But it seems a startling thing to proclaim to every murderer that, in order to secure impunity to himself, he has nothing to do but consume or decompose the body by fire, by lime, or by any other of the well known chemical menstrua, or to sink it in an unfathomable part of the sea (*j*). Unsuccessful attempts of this kind are known to have been made (*k*), and successful ones may have remained undiscovered.

Presumptive

§ 447. The basis of a corpus delicti once established,

(*j*) 3 Benth. Jud. Ev. 234; Bonnier, Traité des Preuves, § 56. We believe that Rolfe, B., once directed a grand jury, that the rule excluding presumptive evidence of the basis of the corpus delicti is not universal. On this subject Chancellor D'Aguesseau expresses himself as follows:— "À Dieu ne plaise que le public puis jamais nous reprocher que nous donnons aux criminels une espérance d'impunité, en reconnaissant qu'il est impossible de les condamner, lorsque leur cruelle industrie aura été assez heureuse pour dérober aux yeux de la Justice, les misérables restes de celui qu'ils ont immolé à leur vengeance:" D'Aguesseau, 1er Plaidoyer dans la cause du Sieur de la Pivardière, &c.

(*k*) In *R.* v. *Cook*, Leicester Sum. Ass. 1834, Wills' Circ. Ev. 165, 3rd Ed., the prisoner was tried for the murder of a creditor who had called to obtain payment of a debt, and whose body he had cut into pieces and attempted to dispose of by burning. The effluvium and other circumstances, however, alarmed the neighbours, and a portion of the body remaining unconsumed, the prisoner was convicted and executed. A similar attempt was made by the accused in *The Commonwealth* v. *Webster*, Burr. Circ. Evid. 682.

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presumptive evidence is receivable to complete the proof of it; as, for instance, to fix the place of the commission of the offence (*l*)—the locus delicti (*m*);—and even to shew the presence of crime, by negativing the hypotheses of the facts proved having been the result of natural causes, or irresponsible agency. For this purpose all the circumstances of the case, and every part of the conduct of the accused, may be taken into consideration (*n*). On finding a dead body for instance, it should be considered whether death may not have been caused by lightning, cold, noxious exhalations, &c., or have been the result of suicide. On this latter subject the following excellent directions, given by Dr. Beck to the members of his own profession, may not inaptly be inserted here (*o*): "Besides noticing the surface of the body, and ascertaining whether ecchymosis or suggillation be present, we should pay great attention to the following circumstances: The situation in which the wounded body is found, the position of its members and the state of its dress, the expression of countenance, the marks of violence, if any be present on the body, the redness or suffusion of the face. The last is important, as it may indicate violence in order to stop the cries of the individual. The quantity of blood on the ground, or on the clothes, should be noticed, and, in particular,

evidence receivable to complete proof of corpus delicti.

Death from violence.

(*l*) *R.* v. *Burdett*, 4 B. & A. 95.

(*m*) Dicks. Ev. in Scotl. 43.

(*n*) So laid down by Buller, J., in the celebrated case of Captain John Donellan, who was convicted and executed for the murder by poison of his brother-in-law, Sir Theodosius Boughton (Warwick Sp. Ass. 1781, Report by Gurney); by Parke, B., in *R.* v. *Tawell*, who was convicted of murder by poison at the Aylesbury Spring Assizes of 1845 (Wills' Circ. Ev. 188, 3rd Ed.); by Abbott, J., in *R.* v. *Donnall*, Launcester Sp. Ass. 1817 (*Id.* 187); by Wilde, C. J., in *R.* v. *Hatfield*, Surr. Sp. Ass. 1847, MS.; by Lord Campbell, in *R.* v. *Palmer*, Cent. Cr. Ct. May, 1856; and by Pollock, C. B., in *R.* v. *Smethurst*, Cent. Cr. Ct. August, 1859. See also *R.* v. *Eldridge*, R. & R. C. C. 440, and *R.* v. *White*, *Id.* 508.

(*o*) Beck's Med. Jurisp. 583, 7th Ed., where several very instructive cases are collected.

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the probable weapon used, the nature of the wound, and its depth and direction. In a case of supposed suicide, by means of a knife or pistol, the course of the wound should be examined, whether it be upwards or downwards, and the length of the arm should be compared with the direction of the injury. Ascertain whether the right or left arm has been used; and as the former is most commonly employed, the direction should correspond with it, and be from right to left." It is of the utmost importance to examine minutely for the traces of another person at the scene of death; for it is by no means an uncommon practice with murderers, so to dispose of the bodies of their victims as to lead to the supposition of suicide or death from natural causes (*p*); while, on the other hand, persons about to commit suicide, but anxious to preserve their reputation after death, or their property from forfeiture, or both, not unfrequently endeavour by special preparations to avert suspicion of the mode by which they came by their end (*q*). And instances have occurred where, after death from natural causes, injuries have been done to a corpse with a view of raising a suspicion of murder against an innocent person (*r*). The following case strongly illustrates the difficulties which sometimes attend investigations of this nature. A man, on detecting his wife in the act of adultery, fell into a state of distraction, and having dashed his head several times against a wall, struck himself violently and repeatedly on the forehead with a cleaver, until he fell dead from a great number of wounds. All this was done in the presence of several witnesses; but suppose it had been otherwise, and that the dead body had been found with these marks of violence upon it, murder would have been at least suspected (*s*). And even where there is the clearest proof

(*p*) Stark. Ev. 857, 4th Ed.
(*q*) *Id.* 863, 4th Ed.
(*r*) See one of these, bk. 2, pt. 2, § 206.
(*s*) Beck's Med. Jurisp. 562, 7th Ed.

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of the infliction of wounds, death may have been caused by previous disease, or violence from some other source. Cases illustrative of the former hypothesis are pretty numerous (*t*); and the two following shew the necessity of not overlooking the latter. At an inn in France, a quarrel arose among some drovers, during which one of them was wounded with a knife on the face, hand, and upper part of the thorax near the right clavicle. The injuries were examined and found to be superficial and slight. They were washed, and an hour afterwards he departed for his home, but the next morning was found dead bathed in blood. Dissection was made, and the left lung and pulmonary artery were found cut. The surgeons deposed that this injury was the cause of death, and that it must have been inflicted after the superficial wound on the thorax, which was not bloody, but surrounded by ecchymosis. Such proved to be the fact,—on his way home he had been robbed and murdered (*u*). In another case, a girl expired in convulsions while her father was in the act of chastising her for a theft; and she was believed, both by himself and the bystanders, to have died of the beating. But, although there were marks of a large number of pretty severe stripes on the body, they did not appear to the medical man who saw it to be quite sufficient to cause death; and he therefore made a post-mortem examination, from which and other circumstances it was discovered, that the girl on finding her crime detected had taken poison through fear of her father's anger (*v*). And, lastly, a source of mischief is found in the destruction or fabrication of *indicia*, through the conduct of persons brought in contact, by duty or otherwise, with the bodies of individuals who have met with a violent death. In such cases, as is

Accidental destruction or creation of *indicia*.

(*t*) Several will be found in Beck's Med. Jurisp. ch. 15, 7th Ed., and Taylor's Med. Jurisp. ch. 29, 7th Ed.

(*u*) Beck's Med. Jurisp. 588, 7th Ed.

(*v*) Beck's Med. Jurisp. 766, 7th Ed.

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well observed by a recent writer on circumstantial evidence: "The first observers are often persons who are so exclusively impressed by the event itself, as to overlook what, at the time, may naturally be deemed insignificant matters; to take no note of them, or at least, none that can be confidently recalled to mind afterwards. The common attentions of humanity all partake of this summary character. The first impulse is to see what relief can be afforded in the case. The body of the sufferer is turned over, raised up, perhaps removed, the blood carefully washed from the wound, &c. In this way important indications may, inadvertently, be wholly obliterated. But a similarly injurious effect upon the evidentiary facts, may be produced by the officious action of one or more persons, attracted to the spot by mere curiosity. The implement of destruction is often first discovered by observers of this class; it is handled with more or less of interest —passed possibly from hand to hand among several— until by this very process, it is more or less deprived of the appearances which give it its peculiar value as an instrument of evidence. In this way not only may genuine facts be destroyed and lost, but spurious facts may be actually, though unintentionally, fabricated and interpolated into the case, to the obvious deception or confusion of those who come to observe afterwards, and who may be the witnesses actually called upon to testify" (*x*). A good illustration of this is afforded by a case which once occurred in France. A young man was found dead in his bed, with three wounds on the front of his neck. The physician who was first called to see him had, unknowingly, stamped in the blood with which the floor was covered, and had then walked into an adjoining room, passing and repassing several times, and thus left a number of bloody footprints on the floor.

(*x*) Burrill, Circ. Ev. 141—2.

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The consequence was that suspicion was raised against a party, who narrowly escaped being sent to take his trial for murder (*y*).

Death from poison.

§ 448. It is in cases of supposed poisoning that the nicest questions arise relative to the proof of a corpus delicti. The evidences of poisoning are either physical or moral. Under the former are included the symptoms during life; the appearance of the body after death, or on dissection; and the presence of poison ascertained by the application of chemical agents used for its detection. Among the moral evidences are peculiar facilities for committing the crime, the purchasing or preparing poisonous ingredients, attempts to stifle inquiry, spreading false rumours as to the cause of death, abortive endeavours to cast suspicion on others, &c. (*z*). The existence of disease, (and poison is not unfrequently administered to persons labouring under it,) will often explain the symptoms during life, and, in some cases, the appearances after death, which latter may likewise be the result of putrefaction; so that, in order to obtain clear proof of a corpus delicti, tribunals willingly avail themselves of the scientific tests which chemistry lends to justice for the detection of crime (*a*). The value of these tests has, however, been much overrated. An infallibility has been attributed to them which they most certainly do not possess; and a notion seems to have got abroad, that in cases of poisoning the corpus delicti must be established by those tests alone, to the exclusion of all consideration of the physical and moral circumstances of the case,—a doctrine which is both contrary to law (*b*), and an outrage on common sense. The science of toxi-

Physical evidences of.

Moral evidences of.

Chemical tests of.

(*y*) Tayl. Med. Jurisp. 274, 7th Ed.

(*z*) "Venenum arguis: ubi emi? à quô? quanti? per quem dedi? quo conscio?" Quintilian, Inst. Orat. lib. 5, c. 7, vers. fin.

(*a*) The tests of a large number of poisons are given with great minuteness in Beck's Med. Jurisp. See also Taylor's Med. Jurisp.

(*b*) See *suprà*, § 447.

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cology is not by any means in a perfect state, particularly as regards the vegetable poisons (*c*); although the tests for one of the worst of them, (hydrocyanic, or prussic acid,) and for the mineral poison most commonly used for criminal purposes, (arsenic,) are among the most complete. It is always advisable to employ as many tests as the quantity of suspected matter will admit; for in the case of each individual test there may, by possibility, be other substances in nature which would produce the appearances supposed to be peculiar to the particular poison; and the danger always exists, more or less, of forming the substance, the existence of which is suspected, by means of the chemical agents used for its detection. But when several tests, based on principles totally distinct, are applied to different portions of a suspected substance, and each gives the characteristic results of a known poison, the chances of error are indefinitely removed; and the proof of the existence of that poison in that substance, especially if there are corroborative moral circumstances, comes short only of positive demonstration.

§ 449. In dealing with cases of suspected poisoning, it must be remembered that even when poison is actually obtained from the dead body, it may not only have been taken by accident, or with the view of committing suicide; but that instances have occurred where, after death from natural causes, a poisonous substance has been introduced into the corpse (*d*), or into matter vomited or discharged from the bowels (*e*), with the view of raising a suspicion of murder. This may, however, be detected by a careful post-mortem examination (*f*), and attention to the moral circumstances of the case.

(*c*) Beck's Med. Jurisp. 754, 7th Ed.

(*d*) Beck's Med. Jurisp. 770, 7th Ed.

(*e*) Taylor's Med. Jnrisp. 16, 4th Ed.

(*f*) Some consequences of poisoning during life, such, for in-

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§ 450. Whatever may be the admissibility or effect of presumptive evidence to *prove* the corpus delicti, it is always admissible, and it is often, especially when amounting to evidentia rei, most powerful to *disprove* it. Thus the probability of the statements of witnesses may be tested by comparing their story with the surrounding circumstances; and in practice false testimony is often encountered and overthrown in this way. Sir Matthew Hale relates an extraordinary trial for rape, which took place before him in Sussex; where the party indicted was an ancient wealthy man, turned of sixty, and the charge was fully sworn against him by a young girl of fourteen, with the concurrent testimony of her mother and father and some other relations; and where the accused defended himself successfully, by showing that he had for many years been afflicted with a rupture, so hideous and great as to render sexual intercourse impossible (*g*). In another case, the prosecutrix of an indictment against a man for administering arsenic to her to procure abortion, deposed that he had sent her a present of tarts, of which she partook, and that shortly afterwards she was seized with symptoms of poisoning. Amongst other inconsistencies, she stated that she had felt a coppery taste in the act of eating, which it was proved that arsenic does not possess; and from the quantity of arsenic in the tarts which remained untouched, she could not have taken above two grains, while, after repeated vomitings, the alleged matter subsequently preserved contained nearly fifteen grains, though the matter first vomited contained only one grain. The prisoner was acquitted, and the prosecutrix afterwards confessed that she had preferred the charge from jealousy (*h*).

Presumptive evidence always admissible to *disprove* corpus delicti.

stance, as the traces of recent inflammation in the upper intestines, cannot, it is said, be imitated by poison injected after death. Beck's Med. Jurisp. 770, 7th Ed.

(*g*) 1 Hale, P. C. 635. See bk. 2, pt. 2, § 201.

(*h*) *R.* v. *Whalley*, York Sp. Ass. 1829, Wills' Circ. Ev. 122, 3rd Ed. See further on this subject

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II. The hypothesis of delinquency should be consistent with *all* the facts proved.

§ 451. II. *The hypothesis of delinquency should be consistent with* ALL *the facts proved* (*i*). The chief danger to be avoided when dealing with presumptive evidence, arises from a proneness natural to man to jump to conclusions from facts, without duly adverting to others inconsistent with the hypothesis which those facts seem to indicate (*k*). "The human mind," says Lord Bacon (*l*), "has this property, that it readily supposes a greater order and conformity in things than it finds; and although many things in nature are singular and entirely dissimilar, yet the mind is still imagining parallel correspondences and relations between them which have no existence." This tendency of the mind is very perceptible in the physical sciences, of which perhaps the most apposite instance is its having been for so many ages assumed as indisputable, that the planetary motions must necessarily be circular, or at least compounded of circular motions, to the utter exclusion of all less regular figures (*m*). When Copernicus also promulgated his theory of the solar system, it was

the elaborate judgment of Lord Stowell in *Evans* v. *Evans*, I Hagg. Cons. Rep. 105.

(*i*) I Stark. Ev. 561, 573, 3rd Ed.; *Id.* 842, 859, 4th Ed.

(*k*) *Suprà*, ch. 1, § 298.

(*l*) "Intellectus humanus, ex proprietate suâ, facilè supponit majorem ordinem et æqualitatem in rebus, quàm invenit: et cùm multa sint in naturâ monodica et plena imparitatis, tamen affingit parallela, et correspondentia, et relativa quæ non sunt." Bacon's Novum Organum, Aphorism 45. See also Bacon's Advancement of Learning, bk. 2.

(*m*) This ancient prejudice proved a great source of embarrassment to Kepler, by whom the elliptical movements were first discovered. In investigating the planetary orbits, he says, "Primus meus error fuit, viam planetæ perfectum esse circulum; tantum nocentior temporis fur, quanto erat ab authoritate omnium philosophorum instructior, et metaphysicæ in specie convenientior." Kepler, De Motibus Stellæ Martis, pars 3, cap. 40. So, it was a received notion among many in the earlier and middle ages, that the number *seven* enjoyed a species of predominance in creation—there being seven notes in music, seven primary colours, seven days in the week, &c.; from all of which it was sagaciously inferred that there necessarily *could not* be more than seven planets.

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objected that, if this hypothesis were true, the inferior planet Venus must, at times, appear gibbous like the moon; a fact which was afterwards fully established, on the invention of the telescope (*n*). And in dealing with questions of fact this natural propensity cannot be too closely watched. If, as was well observed by some one, a certain number of pieces of wood will build a house, with the exception of one cross beam, it is the natural tendency of the mind to reject that beam. It should never be forgotten, as observed by an able writer on the law of evidence, that all facts and circumstances which have really happened were perfectly consistent with each other, for they did actually so consist (*o*); an inevitable consequence of which is, that if any of the circumstances established in evidence is absolutely inconsistent with the hypothesis of the guilt of the accused, that hypothesis cannot be true. Take the case, put in a former section (*p*), of a man indicted for stealing a piece of timber, and a large body of circumstantial evidence adduced to shew that it was carried off by one person, and that person the prisoner. Now, suppose it were to transpire in the course of the trial that the article stolen was so heavy that twenty men could not move it, here would be a fact absolutely inconsistent with the hypothesis of guilt, and clearly indicating mistake or mendacity somewhere. And not only may the hypothesis of guilt be overturned by facts absolutely falsifying it, but due attention should be paid to all contrary hypotheses and infirmative circumstances.

(*n*) Herschel's Discourse on the Study of Natural Philosophy, pt. 3. ch. 3.

(*o*) 1 Stark. Ev. 560, 3rd Ed.; *Id.* 842, 4th Ed.

(*p*) *Suprà*, sect. 1, sub-sect. 3, § 332.

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Sub-Section III.

INCULPATORY PRESUMPTIVE EVIDENCE IN CRIMINAL PROCEEDINGS.

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Inculpatory presumptive evidence in criminal proceedings.

§ 452. We now proceed to examine more in detail the principal forms of inculpatory presumptive evidence in criminal cases. They are reducible to these general heads (*q*):—

1. Real evidence.

First. Real Evidence, or evidence from things.

2. Evidence from *antecedent* conduct or position.

Secondly. Evidence derived from the *antecedent* conduct or position of the accused. Under this head come motives to commit the offence: means, and opportunities

(*q*) The author deems it common justice to acknowledge the large use he has made throughout this sub-section, of the 5th Book of Bentham's Treatise on Judicial Evidence, where he treats of circumstantial evidence. In that part of his work, we have the full benefit of the strong sense and observant mind of the writer, comparatively free from the peculiar notions and erroneous views which pervade and disfigure so much of the rest.

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of committing it: preparations for the commission of, and previous attempts to commit it: declarations of intention, and threats to commit it.

Thirdly. Evidence derived from the *subsequent* conduct of the accused. To this class belong sudden change of life or circumstances: silence when accused: false, or evasive, statements made by him: suppression, or eloignment of evidence: forgery of exculpatory evidence: evasion of justice, by flight or otherwise, and tampering with officers of justice: fear; indicated either by passive deportment or a desire for secrecy. 3. Evidence from *subsequent* conduct.

Fourthly. Confessorial evidence. 4. Confessorial evidence.

Each of these has of course its peculiar probative force and infirmative hypotheses. The subject of real evidence has been treated in a former part of this work (*r*); the suppression and eloignment of evidence, and the forgery of exculpatory evidence, have been mentioned under the head of presumptions in disfavour of a spoliator (*s*); while silence under accusation, and false or evasive statements, as likewise confessorial evidence, will be reserved for the title of self-regarding evidence (*t*), to which they most properly belong. The others will now be treated in their order.

§ 453. I. MOTIVES TO COMMIT THE OFFENCE, AND MEANS AND OPPORTUNITIES OF COMMITTING IT.—A mischievous event being supposed to have been produced, and Titius being suspected of having been concerned in the production of it, "What could have been his *motive?*" says a question, the pertinency of which will never be matter of dispute (*u*). The mere fact, however, of a party being so situated, that an advantage would accrue to him from the commission of a crime, amounts to nothing, or next to nothing, as a proof of his having committed it. Almost every child has something to I. Motives, means, and opportunities.

(*r*) Bk. 2, pt. 2.
(*s*) *Suprà*, sect. 2, sub-sect. 8.
(*t*) *Infrà*, ch. 7.
(*u*) 3 Benth. Jud. Ev. 183.

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gain by the death of his parents, but how rarely on the death of a parent is parricide even suspected (*x*). Still, under certain circumstances, the existence of a motive becomes an important element in a chain of presumptive proof; as where a person, accused of having set fire to his house, has previously insured it to an amount exceeding its value; or where a man, accused of the murder of his wife, has previously formed an adulterous connection with another woman, &c. On the other hand, the absence of any *apparent* motive is always a fact in favour of the accused; although the existence of motives invisible to all except the person who is influenced by them must not be overlooked. The infirmative hypotheses affecting *motives* to commit an offence are applicable, also, to *means* and *opportunities* of committing it (*y*); and some unhappy cases shew the danger of placing undue reliance on them. A female servant was charged with having murdered her mistress. No persons were in the house but the deceased and the prisoner, and the doors and windows were closed and secure as usual. The prisoner was condemned and executed, chiefly on the presumption that no one else could have had access to the house; but it afterwards appeared, by the confession of one of the real murderers, that they had gained admittance into the house, which was situated in a narrow street, by means of a board thrust across the street from an upper window of an opposite house, to an upper window of that in which the deceased lived; and that, having committed the murder, they retreated the same way, leaving no traces behind them (*z*).

II. Preparations, and previous attempts.

§ 454. II. PREPARATIONS FOR THE COMMISSION OF AN OFFENCE, AND PREVIOUS ATTEMPTS TO COMMIT IT. —Under the head of *preparations* for the commission

(*x*) 3 Benth. Jud. Ev. 187—8. For another instance, see Burrill, Circ. Evid. 371.
(*y*) *Id.* 189.
(*z*) Stark. Ev. 865, 4th Ed.

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of an offence may be ranked the purchasing, collecting, or fashioning instruments of mischief; repairing to the spot destined to be the scene of it; acts done with the view of giving birth to productive or facilitating causes, or of removing obstructions to its execution, or averting suspicion from the criminal (*a*). Besides preparations of this nature, which are immediately pointed to the accomplishment of the principal design, there are others of a secondary nature, for preventing discovery or averting suspicion of the former (*b*). In addition to these preparations of the second order, may be imagined preparations of the third and fourth orders, and so on (*c*).

§ 455. Of all species of preparations, those which are resorted to for the purpose of averting suspicion from the criminal require the most particular notice. A remarkable instance is presented in the case of Richard Patch, who was convicted and executed for the murder of his patron and friend Isaac Blight. The prisoner and deceased lived in the same house, and the latter was shot one evening while sitting in his parlour, by a pistol from an unseen hand. A strong and well-connected chain of circumstantial evidence fixed Patch as the murderer; in the course of which it appeared that, a few evenings before that on which the murder was committed, and while the deceased was away from home, a loaded gun or pistol had been discharged into the room in which the family when at home usually passed their evenings. This shot the prisoner represented at the time as having been fired at him, but there was every reason to believe that it must have been fired by himself, in order to induce the deceased and his servants to suppose that assassins were prowling about the building (*d*). Murderers are frequently found busy for some

(*a*) 3 Benth. Jud. Ev. 63, 64.
(*b*) *Id.* 64.
(*c*) *Id.* 65.
(*d*) Trial of Richard Patch, for the murder of Isaac Blight, London, 1806. For another in-

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time previous to their crime in spreading rumours that from ill-health, imprudence, or other cause, the existence of their victim is likely to be short (*e*); others prophesy impending mischief to him in more defined terms, and those in the lower walks of life throw out dark and mysterious hints as to his approaching death (*f*). The object of all this is to prepare the minds of his friends and neighbours for the event, and by diminishing surprise, to prevent investigation into its cause. *Previous attempts* to commit an offence are closely allied to *preparations* for the commission of it, and only differ in being carried one step farther and nearer to the criminal act, of which however, like the former, they fall short (*g*).

Infirmative hypotheses.

§ 456. The probative force, both of preparations and previous attempts, manifestly rests on the presumption that an intention to commit the individual offence was formed in the mind of the accused, which persisted until power and opportunity were found to carry it into execution. But, however strong this presumption may be when the corpus delicti has been proved, it must be taken in connection with the following infirmative hypotheses. 1°. The intention of the accused in doing the suspicious act is a psychological question, and may be mistaken. His intention may either have been altogether innocent, or, if criminal, directed towards a different object (*h*). 1. Thus, a person may be poisoned, and another, innocent of his death, may have purchased a quantity of the same poison a short time before for the purpose of destroying vermin. So, predictions of approaching mischief to an individual, who is afterwards found murdered, may frequently be explained on the ground that

stance, see *R.* v. *Courvoisier*, Willes, Ev. 241, 3rd Ed.

(*e*) 3 Benth. Jud. Ev. 65–66; Wills, Circ. Ev. 79, 3rd Ed.

(*f*) Stark. Ev. 850, 4th Ed.

(*g*) 3 Benth. Jud. Ev. 69.

(*h*) *Id.* 72.

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the accused was really speaking the conviction of his own mind, without any criminal intention—prophecies of death are much more frequently the offspring of superstition than of premeditated assassination. 2. As an example of criminal intention with a different object—murder by fire-arms is not uncommon; and a person innocent of a murder might, a short time previous to its commission, have purchased a gun for the purpose of poaching, or even have stolen one which is found in his possession. So, A. might purchase a sword or pistol for the purpose of fighting a duel with B., but, before the meeting took place, the weapon might be purloined or stolen by C., in order to assassinate D.

§ 457. 2°. But, even when preparations have been made with the intention of committing the identical offence charged, or previous attempts have been made to commit it, two things remain to be considered (*i*): 1. The intention may have been changed or abandoned, before execution. Until a deed is done, there is always a *locus pœnitentiæ;* and the possibility of a like criminal design having been harboured and carried into execution by other persons, must not be overlooked. 2. The intention to commit the crime may have persisted throughout, but the criminal may have been anticipated by others. A remarkable instance of this is presented by the celebrated case of Jonathan Bradford. This man was an innkeeper. In the middle of the night, a guest in his house was found murdered in bed, his host standing over the bed with a dark lantern in one hand and a knife in the other. The knife and the hand which held it were both bloody, and Bradford on being thus discovered exhibited symptoms of the greatest terror. He was convicted and executed for this murder; but it afterwards appeared that it had been committed by an-

(*i*) 3 Benth. Jud. Ev. 74.

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other person immediately before he came into the room of the deceased. But Bradford had entered it with a similar design; the symptoms attributed to consciousness of guilt were partly attributable to surprise at finding his purpose anticipated; while the blood on his hand and knife was occasioned by his having, when turning back the bed-clothes to see if the deceased were really dead, dropped the knife on the bleeding body (*k*).

III. Declarations of intention, and threats.

§ 458. III. DECLARATIONS OF INTENTION TO COMMIT AN OFFENCE, AND THREATS TO COMMIT IT.—Next to preparations and attempts, follow declarations of intention, and threats to commit the offence which is found perpetrated. Most of the infirmative hypotheses applicable to the former are incident to those now under consideration, which, however, have some additional ones peculiar to themselves. 1st. The words supposed to be declaratory of criminal intention may have been misunderstood, or misremembered. 2ndly. It does not necessarily follow because a man avows an intention, or threatens to commit a crime, that such intention really exists in his mind. The words may have been uttered through bravado, or with the view of annoying, intimidating, extorting money, or other collateral objects. 3rdly. Besides, another person really desirous of committing the offence may have profited by the occasion of the threat, to avert suspicion from himself (*l*). 4thly.

Infirmative hypotheses.

(*k*) Theory of Pres. Proof, Append. Case 7.

(*l*) A curious instance of this is related by a very old French authority. A woman of extremely bad character, one day, in the open street, threatened a man who had done something to displease her, that she would "get his hams cut across for him before long." A short time afterwards he was found dead, with his hams cut across, and several other wounds. This was of course sufficient to excite suspicion against the female, who according to the practice of continental tribunals at that time, was put to the torture, confessed the crime, and was executed. Shortly afterwards, however, a man who had been taken into custody for some other offence, declared that she was innocent, and that the murder

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It must be remembered that the tendency of a threat or declaration of this nature is to frustrate its own accomplishment. By threatening a man you put him upon his guard, and force him to have recourse to such means of protection as the law, or any extrajudicial powers which he may have at command, may be capable of affording to him (*m*). "Still, however," as has been judiciously observed, "by the testimony of experience, criminal threats are but too often, sooner or later, realized. To the intention of producing the terror, and nothing but the terror, succeeds, under favour of some special opportunity, or under the spur of some fresh provocation, the intention of producing the mischief; and (in pursuance of that intention) the mischievous act" (*n*). "Threats," observes a recent author (*o*), "are often disregarded and despised; it is only the more timid dispositions that are influenced by them; and in most minds, there is an unwillingness, even if fear be felt, to manifest it by any outward acts or cautionary proceedings. To this contempt of the mere language of an enemy and the exposure of person which has followed, have many courageous persons notoriously owed their deaths. And it may be that the threatener, in these cases, has counted, in advance, upon this very circumstance."

IV. Change of life or circumstances.

§ 459. IV. CHANGE OF LIFE OR CIRCUMSTANCES.— Having examined the probative force of criminative facts

had been committed by another man of whom he was the accomplice. That person was immediately arrested, and confessed the whole truth as follows: that happening to be passing in the street when the threat was uttered, he took advantage of that circumstance to make away with the murdered man, well assured that the woman's bad character would immediately direct towards her the attention of the officers of justice. Papon, Arrests, Liv. 24, tit. 8, arrest 1; cited, not very accurately, in the Causes Célèbres, vol. 5, p. 437, Ed. Richer, Amsterdam, 1773.

(*m*) 3 Benth. Jud. Ev. 78.

(*n*) *Id.*

(*o*) Burrill, Circ. Ev. 342.

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existing before, though perhaps not discovered until after the perpetration of the offence, we proceed to consider those occurring subsequent to it. Among these the first that naturally presents itself to notice, is a change of life or circumstances not easily capable of explanation, except on the hypothesis of the possession of the fruits of crime; as, for instance, where shortly after a larceny or robbery, or the suspicious death or disappearance of a person in good circumstances, a person previously poor is found in the possession of considerable wealth (*p*); and the like. The civil law held that the suddenly becoming rich was not even primâ facie evidence of dishonesty against a guardian (*q*); and in our criminal courts it is not, when standing alone, any ground for putting a party on his defence (*r*).

V. Evasion of justice.

§ 460. V. EVASION OF JUSTICE.—By "Evasion of justice" is meant the doing some act indicative of a desire to avoid, or stifle judicial inquiry, into an offence of which the party doing the act is accused or suspected. Such desire may be evidenced by his flying from the country or neighbourhood; removing himself, his family, or his goods, to another place; keeping concealed, &c. To these must be added the kindred acts of bribing or tampering with officers of justice, to induce them to permit escape, suppress evidence, &c. All these afford a presumption of guilt, more or less cogent according to circumstances.

Change of place only presumptive evidence of.

§ 461. The fact that about the time of the commission of an offence, a person accused or suspected of it left the country, changed his home, &c., is only presumptive evidence of an intention to escape being rendered amenable to justice for that offence—a man may change his abode for health, business, or pleasure. In order to estimate

(*p*) See Burdock's case, Appendix, No. 1, Case 2.

(*q*) Cod. lib. 5, tit. 51, l. 10.

(*r*) 2 Ev. Poth. 345.

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the weight due to this presumption, it is most important to inquire into the party's general mode of life. In the case of a mariner, carrier, itinerant vender or itinerant handicraft, the inference of guilt from change of place might amount to little or nothing (*s*). Moreover, the object in absconding might be to avoid civil process, or inquiry into some other offence (*t*).

Infirmative hypotheses.

§ 462. But even the clearest proof that the accused absented himself to avoid the actual charge against him, although a strong circumstance, is by no means conclusive evidence of guilt. Many men are naturally of weak nerve, and, under certain circumstances, the most innocent person may deem a trial too great a risk to encounter. He may be aware that a number of suspicious, though inconclusive facts, will be adduced in evidence against him; he may feel his inability to procure legal advice to conduct his defence, or to bring witnesses from a distance to establish it; he may be fully assured that powerful or wealthy individuals have resolved on his ruin, or that witnesses have been suborned to bear false testimony against him. Add to all this that, even under the best regulated judicial system, more or less vexation must necessarily be experienced by all persons who are made the subject of criminal charges, which vexation it may have been the object of the party to elude by concealment, with the intention of surrendering himself into the hands of justice when the time for trial should arrive (*u*). These considerations

(*s*) 3 Benth. Jud. Ev. 176.

(*t*) *Id.* 180.

(*u*) For the purpose of computing the average duration of a penal suit in France, the thirty volumes, in closely printed 12mo., of the Causes Célèbres were examined. It was not in every instance that the duration of the suit could be ascertained: but, in those in which it could, the average duration turned out to be near *six* years. (3 Benth. Jud. Ev. 174.) In this country, in places where there is no winter assize, a party committed in the month of September for a serious felony, cannot be tried until the following February or March.

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are entitled to weight at all times, and in all places; but in addition to them, the nature and character of the tribunal before which, and of the administration of justice in the country where the trial is to take place, must never be lost sight of. To say nothing of those cases where the tribunal lies under just suspicion of positive corruption, partiality, or prejudice, the principles on which it avowedly acts may in themselves be sufficient, to deter any man from voluntarily placing himself in its power. In the case, for instance, of those tribunals which act on the maxims, "In atrocissimis leviores conjecturæ sufficiunt, et licet judici jura transgredi" (*x*); "Hæreseos suspectus, tanquam hæreticus condemnatur, nisi omnem suspicionem excusserit" (*y*); or of others which, on slight evidence, would, in order to extract confession, torture a suspected man so as perhaps to disable him for life (*z*); or of others acting on the principle laid down by certain eminent moralists, that it is justifiable to deliver up to capital punishment individuals whose guilt is not indisputably proved, on the ground that those who fall by a mistaken sentence may be considered as falling for their country (*a*), is it matter of wonder that innocent persons should fly to avoid the impending danger? Would it not be more surprising to find any waiting to meet the course of justice (*b*)?

§ 463. But there are other considerations, independent of tribunals or their practice, which might powerfully influence a man to seek to avoid being tried for a

(*x*) Introd. pt. 2, § 49, note (*q*).

(*y*) Devot. Inst. Canon. lib. 3, tit. 9, § 31, Ed. 1852.

(*z*) See Introd. pt. 2, § 70, note (*l*), also § 69, and any treatise on the practice of the civil law in criminal cases.

(*a*) See Introd. pt. 2, § 49, note (*q*).

(*b*) What a picture of the state of criminal procedure in the country where he lived, is presented by the declaration of the French lawyer, that he would fly if accused of stealing the steeples of Nôtre Dame! 3 Benth. Jud. Ev. 175.

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suspected crime. The case may have attracted much public attention, and a strong popular feeling may prevail against the supposed criminal. And here the occasional misconduct of the public press must not be overlooked. When facts have come to light indicating the probable commission of some crime conspicuous for its peculiarity or atrocity, the press of this country has too often forgotten the honourable position it ought to occupy, and the fearful responsibility consequent on the abuse of its power. Under colour of a horror of the crime, but more probably with the view of pandering to excited curiosity and morbid feeling, a course has been taken, calculated to deprive of all chance of a fair trial the unfortunate individual who was suspected of it. For weeks or months previous, his conduct and character have been made the continual subject of condemnatory discussion in the public prints, and in all places within the sphere of their influence. Circumstantial descriptions of the way in which the crime was committed, and sometimes actual delineations of it, with the accused represented in the very act; elaborate histories of his past life, in which he has been spoken of as guilty of crimes innumerable; minute accounts of his conduct in the retirement of his cell, and while under examination; and expressions of wonder and rage that he has had the audacity to withhold a confession of his guilt, have been daily and hourly poured forth. In one case, while certain parties were awaiting their trial for murder, the whole scene of the murder, of which, of course, they were assumed to be the perpetrators, was *dramatized*, and represented to a metropolitan audience (*c*). The necessary consequence was, that a firm belief of the guilt of the accused was

(*c*) On the 7th of January, 1824, John Thurtell and Joseph Hunt were tried and convicted on unquestionable evidence for the murder of William Weare, on the 17th of October, 1823. The murder was dramatized, and the piece played at the Surrey Theatre on the 17th of November preceding the trial.

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imperceptibly worked into the minds of the better portion of society, while the rest was inflamed to the highest pitch of excitement and exasperation against him. In the midst of all this the trial took place, which, under such circumstances, could be little better than a mockery. The judge and jury could hardly be considered, even by themselves, as individuals chosen to decide impartially on the guilt or innocence of the accused; but must rather have been expected to be formal registrars of a verdict of condemnation, already iniquitously given against him by the community, before he was heard in his defence. It is gratifying to be able to add that the misconduct here spoken of has, of late years, been greatly on the decline.

Offences committed under prospect of change of place.

§ 464. We must not, however, dismiss this subject without observing that cases sometimes occur, where an offence is committed under the prospect of impunity offered by a change of place resolved on from other motives.

Ancient laws on this subject.

§ 465. Few things distinguish an enlightened from a rude and barbarous system of judicature more than the way in which they deal with evidence. The former *weighs* evidence; the latter, conscious perhaps of its inability to do so with effect, or careless of the consequences of error, sometimes rejects it in masses, and at others converts pieces of evidences into rules of law, by investing with conclusive effect some whose probative force has been found to be in general considerable. Our ancestors, observing that guilty persons commonly fled from justice, adopted the hasty conclusion that it was only the guilty who did so, according to the maxim, "Fatetur facinus qui fugit judicium" (*d*). Under the old law, a man who fled to avoid being tried for treason

(*d*) 5 Co. 109 b; 11 Co. 60 b; Jenk. Cent. 1 Cas. 80.

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or felony, forfeited all his goods and chattels, even though he were acquitted (*e*); and in such cases the jury were charged to inquire, not only whether the accused were guilty of the offence, but also whether he had fled for it, and if so what goods and chattels he had. This practice was not formally abolished until the 7 & 8 Geo. 4, c. 28, s. 5. Nor was the notion peculiar to the English law. We find traces of it among the earlier civilians, who lay down, "Reus per fugam sui penè accusator existit" (*f*). Among the later civilians (*g*), as well as among ourselves in modern times, more correct views have prevailed; and the evasion of justice seems now nearly, if not altogether, reduced to its true place in the administration of the criminal law, namely, that of a *circumstance*—a fact which it is always of importance to take into consideration; and which, combined with others, may supply the most satisfactory proof of guilt, although, like any other piece of presumptive evidence, it is equally absurd and dangerous to invest with infallibility.

VI. Fear indicated by passive deportment, &c.

§ 466. VI. FEAR INDICATED BY PASSIVE DEPORTMENT, &c.—The emotion of *fear* indicated by passive deportment when a party is accused, or perceives that he is suspected of an offence, is sometimes relied on as a criminative circumstance. The following physical symptoms may be indicative of fear:—"Blushing, paleness, trembling, fainting, sweating, involuntary evacuations, weeping, sighing, distortions of the countenance, sobbing, starting, pacing, exclamation, hesitation, stammering, faltering of the voice," &c. (*h*); and, as the

(*e*) Co. Litt. 373 a and b; 5 Co. 109 b; 19 Ho. St. Tr. 1098. According to some authorities, indeed, this forfeiture was inflicted on the ground that the flight was a contempt of the law and substantive crime in itself. Plowd. 262; 19 Ho. St. Tr. 1098.

(*f*) Voet. ad Pand. lib. 22, tit. 3, N. 5; Novel. 53, cap. 4.

(*g*) Mascard. de Prob. Concl. 499; Matth. de Prob. cap. 2, N. 69; Voet. in loc. cit.

(*h*) 3 Benth. Jud. Ev. 153.

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probative force of each of these depends on the correctness of the inference, that the symptom has been caused by fear of detection of the offence imputed, two classes of infirmative hypotheses naturally present themselves.

Infirmative hypotheses.

1st. The emotion of fear may not be present in the mind of the individual. Several of the above symptoms are indicative of disease, and characteristic of other emotions, such as surprise, grief, anger, &c. With respect to the first, for instance, "blushing," the flush of fever and the glow of insulted innocence are quite as common as the crimson of guilt. 2ndly. The emotion of fear, even if actually present, although presumptive, is by no means conclusive evidence of guilt of the offence imputed. The alarm may be occasioned by the consciousness of another crime, committed either by the party himself, or by others connected with him by some tie of sympathy, on whom judicial inquiry may bring down suspicion or punishment (*i*); or even by the recollection of a fact, in consequence of which, without any delinquency at all, vexation has been, or is likely to be, produced to him or them (*k*). So, the apprehension of condemnation and punishment though innocent, or of vexation and annoyance from prosecution, is a circumstance the weight of which, like that of the evasion of justice, depends very considerably on the character of the tribunal before which, and the forms of criminal procedure in the country where his trial is to take place (*l*). Lastly, the rare, though no doubt possible, case of the falsity of the supposed self-criminative recollection (*m*). E. g. an habitual thief is taken into custody for a theft; that he should shew symptoms of fear is natural enough, and, confounding one of his exploits with another, he may (especially if the time of the supposed offence be very remote)

(*i*) 3 Benth. Jud. Ev. 157.
(*k*) *Id.*
(*l*) *Supra*, § 462.
(*m*) 3 Benth. Jud. Ev. 157.

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imagine himself to recollect a theft in which, in truth, he bore no part (*n*).

Closely allied to this subject is the inference of the existence of alarm, and through it of delinquency, derived from *Confusion of mind;* as expressed in the countenance, or by discourse, or conduct (*o*). This, however, like the former, is subject to the infirmative hypotheses, 1st. That the alarm may be caused by the apprehension of some other crime or some disagreeable circumstance coming to light (*p*); 2nd. Consciousness on the part of the accused or suspected person that, though innocent, appearances are against him (*q*). Confusion of mind.

§ 467. VII. Fear indicated by a desire for secrecy.—The presence of fear may be evidenced in another way, namely, by acts shewing a desire for secrecy; such as doing in the dark what, but for the criminal design, would naturally have been done in the light; choosing a spot supposed to be out of the view of others for doing that which, but for the criminal design, would naturally have been done in a place open to observation; disguising the person; taking measures to remove witnesses from the scene of the intended unlawful action, &c. (*r*). Acts such as these are however frequently capable of explanation. 1st. It is perfectly possible that the design of the person seeking secrecy may be altogether innocent, at least so far as the criminal law is concerned (*s*). The lovers of servants, for in- VII. Fear indicated by a desire for secrecy.

(*n*) 3 Benth. Jud. Ev. 158.

(*o*) *Id.* 149.

(*p*) There is a well-known case of a man, who being wrongly suspected of harbouring a person accused of a state crime, his house and even his bed-chamber as he was lying in bed, were searched by the officers of justice. He had at the moment in bed with him a female whose reputation would have been ruined by the disclosure; and confusion, more or less, he must have betrayed. His presence of mind saved himself and her, by uncovering enough of her person to indicate the sex, without betraying the individual. See 3 Benth. Jud. Ev. 151 (note).

(*q*) 3 Benth. Jud. Ev. 151.

(*r*) *Id.* 160, 161.

(*s*) *Id.* 162.

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stance, are often mistaken for thieves, and vice versâ (*u*). 2ndly. The design, even if criminal, may be criminal with a different object, and of a degree less culpable than that attributed (*x*); as, for instance, where a man, with a view of making sport by alarming his neighbours, dresses himself up to pass for a ghost (*y*).

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General observations on the subject of this section.

§ 468. The subject of the present section may fairly be termed the Romance of Jurisprudence, and is indeed one of the few parts of that matter-of-fact science in which it becomes necessary, under penalty of the gravest consequences, to guard against illusions of the imagination. Unfortunately for the interests of society, the true principles on which presumptive evidence rests have not always been understood or adverted to by those entrusted with power; and the judicial histories of every country supply melancholy instances, where the safety of individuals has been sacrificed to the ignorance, haste, or misdirected zeal of judges and jurymen dealing with this mode of proof. The consequence has been that a prejudice has arisen against it, so that a declamation on the dangers of convicting on presumptive evidence is ever sure of the ready ear of a popular assembly. Viewed either in a legislative or professional light such an argument is scarcely deserving serious refutation. No form of judicial evidence is infallible—however strong in itself, the degree of assurance resulting from it amounts only to an inde-

No form of judicial evidence is infallible.

(*u*) 3 Benth. Jud. Ev. 162.
(*x*) *Id.*
(*y*) 3 Benth. Jud. Ev. 163.

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finitely high degree of probability (*z*); and perhaps as many erroneous condemnations have taken place on false or mistaken direct testimony, as on presumptive proof (*a*). Indeed, the most unhappy instances are those where the tribunal has been deceived by suspicious circumstances, casual or forged, coupled with false direct testimony; for in such cases the two species of evidence (though each is fallacious in itself) prop up each other. And as in the most important transactions of life, in all the moral, and most of the physical sciences, we are compelled to rely almost exclusively on probable or presumptive reasoning (*b*), it seems difficult to suggest why a higher degree of assurance should be required in judicial investigations, even were such assurance attainable.

Fallacy of the maxim "facts cannot lie."

§ 469. But while we condemn this, perhaps not unnatural error, what must be said of one of an opposite kind, infinitely more mischievous because promulgated by authority which we are bound to respect,—namely, the setting presumptive evidence above all other modes of proof, and investing it with infallibility? Juries have been told from the bench, even in capital cases, that "where a violent presumption *necessarily* arises from circumstances, they are more convincing and satisfactory than any other kind of evidence, because *facts cannot lie*" (*c*). Numerous remarks might be made on this

(*z*) See Introd. pt. 1, §§ 7 and 27; bk. 1, pt. 1, § 95.

(*a*) For cases of mistaken identity, see *infra*, ch. 6. On the other hand, as every one must be aware, positive direct testimony frequently has its origin in wilful falsehood. The most heinous offences, murder not excepted, have occasionally been committed with the view of afterwards accusing innocent persons of them, in order to obtain a reward held out for the conviction of offenders. At Dublin, in January, 1842, one John Delahunt was convicted and executed for an offence of this nature. See also *R.* v. *M'Daniel and others*, O. B. Sess. 1755, reported in Foster's C. L. 121.

(*b*) Locke on the Human Understanding, bk. 4, ch. 14.

(*c*) Per Legge, B., in the case of *Mary Blandy*, 18 Ho. St. Tr.

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strange dogma; the first of which that presents itself is, that the moment we talk of anything following as a *necessary* consequence from others, all idea of *presumptive* reasoning is at an end (*d*). Secondly, that even assuming the truth of the assertion that facts or circumstances cannot lie, still so long as witnesses and documents, by which the existence of those facts must be established (*e*), can lie, or even honestly misrepresent, so long will it be impossible to arrive at infallible conclusions from circumstantial evidence. But, without dwelling on these considerations, look at the broad proposition "*facts cannot lie.*" Can they not, indeed? When, in order to effect the ruin of a poor servant, his box is opened with a false key, and a quantity of goods stolen from his master is deposited in it: or, where a man is found dead, with a bloody weapon lying beside him, which is proved to belong to a person with whom he has had a quarrel a short time before, and footmarks of that person are traced near the corpse; but the murder has in reality been committed by a third person who, owing a spite to both, put on the shoes of one of them and borrowed his weapon to kill the other, do not the circumstances *lie*—wickedly, cruelly, *lie* (*f*). There is every reason to fear that a blind reliance on the dictum, "facts cannot lie," has occasionally exercised a mischievous effect in the administration of justice.

1187. See also, per Buller, J., in *Donellan's case*, Warwick Sp. Ass. 1781, Report by Gurney; per Mounteney, B., in *Annesley* v. *Earl of Anglesea*, 17 Ho. St. Tr. 1430; Gilb. Evid. 157, 4th Ed.; Paley's Moral and Political Philosophy, bk. 6, ch. 9; and the Works of Chancellor D'Agnesseau, Tom. 12, p. 647.

(*d*) See *suprà*, § 468.

(*e*) Domat, Lois Civiles, pt. 1, liv. 3, tit. 6, Préamb.; Theory of Presumptive Proof, pp. 23 and 28.

(*f*) A bad case of this latter kind is given in the Theory of Presumptive Proof, Append. Case 10. See also the case of *Adrien Doué*, 5 Causes Célèbres, 444, Ed. Richer, Amsterd. 1773; and *suprà*, bk. 2, pt. 2, on Real Evidence. See also the story narrated by Cicero, de Inv. lib. 2, s. 4, cited Ram on Facts, 97, and the quotation from Cymbeline in Goodeve on Evidence, 43—4.

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Cautions to tribunals respecting presumptive evidence.

§ 470. In dealing with judicial evidence of all kinds ignorance dogmatizes, science theorizes, sense judges. The right application of presumptive, as of other species of evidence, depends on the intelligence, the honesty, and the firmness of tribunals. To convict, at least in capital cases, on the strength of a single circumstance, is always dangerous; and it has been justly observed, that where the criminative facts of a presumptive nature are more numerous, most of the erroneous convictions which have taken place have arisen from relying too much on general appearances, when no inchoate act approaching the crime has been proved against the accused (*g*).

Superstitious notions.

§ 471. But the stream, and even the source of justice, may be poisoned by causes irrespective of the imbecility of laws or the errors of tribunals. One of these, from the influence it has frequently exercised in capital cases, and especially when the proof against the accused has been presumptive, deserves particular attention. We allude to the prevalence of superstitious notions, which, although much diminished by the march of enlightenment and civilization, is far from extinct. The days are, it is true, gone by when supernatural agency was allowed to supply chasms in a chain of proof; when persons were condemned to death on the supposed testimony of apparitions (*h*), or because the corpse bled

(*g*) Theory of Presumptive Proof, 58, 59.

(*h*) At a trial in 1754, for murder, before the Court of Justiciary in Scotland, two witnesses were allowed to swear to their having seen a ghost or spirit which they said had told them where the body was to be found, and that the pannels (i. e. the accused) were the murderers. Burnett's Crim. Law of Scotland, 529. See, also, the unfortunate case of John Miles, who, in some degree at least, owed his conviction for the murder of his friend William Ridley, to the reports spread through the neighbourhood that the house, the scene of the supposed murder, (for none had been committed in reality, the deceased having accidentally fallen into a deep privy where no one thought of looking

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at their touch (*i*); but the *spirit* of superstition is ever the same. There is a notion still very prevalent among the lower orders of society, (though not by any means confined to them,) that no person would venture to die with a lie in his mouth; and, consequently, that when a criminal awaiting his execution, especially a criminal who evinces religious feeling, makes a solemn protestation of his innocence, no alternative remains but to believe him, and that the tribunal by which he was condemned was either corrupt or mistaken. It is difficult to imagine a fallacy more dangerous to the peace of society than this. Conceding that such protestations are always deserving of attention from the

for him,) was haunted, and that the ghost of the deceased had appeared to an old man and denounced Miles as his murderer. Theory of Presumptive Proof, Append. Case 5. In the American case of the Boorns, likewise, so late as 1819, it is mentioned, that a person repeatedly dreamed of the murder with great minuteness of circumstance both in regard to the death and the concealment of the remains; but the innocence of the prisoners was fully established by the appearance of the party supposed to have been murdered. 1 Greenl. Ev. § 214, note (2), 7th Ed.

(*i*) Huberus, Præl. Jur. Civ. lib. 22, tit. 3, N. 15, when speaking of slight presumptions, says, "Huc etiam pertinet fama sive rumor, et fuga, item fluxus sanguinis è cadavere, ad alicujus præsentiam, respectu cædis. Id enim ut aliquando dederit occasionem homicidæ detegendi, ita sæpè aliis causis, licet occultis, evenisse legitur." See, also, Burnett *ubi suprà*. In this country, in the case of Mary Norkott and others, who were tried at the bar of the King's Bench, in the 4 Car. I. (1628—9), on an appeal of the murder of Jane Norkott, wife of one of the accused, two respectable clergymen swore that, the body having been taken out of the grave and laid on the grass thirty days after death, and one of the parties required to touch it, "the brow of the dead, which before was of a livid and carrion colour, began to have a dew, or gentle sweat, arise on it, which increased by degrees, till the sweat ran down in drops on the face; the brow turned to a lively and fresh colour, and the deceased opened one of her eyes, and shut it again; and this opening the eye was done three several times; she likewise thrust out the ring or marriage finger three times, and pulled it in again; and the finger dropped blood from it on the grass." 14 Ho. St. Tr. 1324, reported by Serjeant Maynard.

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executive, what is there to invest them with any conclusive effect, in opposition to a chain of presumptive evidence the force of which falls short only of mathematical demonstration? The criminal, it is argued, is standing on the confines of a future world. True; but perhaps he does not believe in its existence. Take, however, the strongest case. Suppose his faith undoubted, that he has attended most assiduously to every religious duty, and displayed up to the very moment of execution, a becoming sense of contrition for past offences in general; but that he solemnly declares his innocence of the crime for which he is about to suffer,—must he necessarily be believed? Is there nothing else to be taken into consideration? He reflects on the obloquy which an avowal of his guilt will bring on his family and connexions,—that its effect will be to expose them to the finger of scorn for generations to come, or, perhaps, to reduce them to poverty, or drive them to self-expatriation. With all this present to his mind we need not be astonished if a criminal, whose notions of morality were perhaps never very clear, should, particularly when regard for his own memory is taken into the account, delude himself into the belief that a false protestation of innocence, made to avert so much evil, is an offence of an extremely venial nature, if not an act deserving positive approbation. We must not forget the position in life and the character of the persons who commonly make these protestations, or expect them to see with the eyes of philosophy, the extent of the mischief which will inevitably result from a conviction in the public mind, that an innocent man has been sacrificed by a corrupt or mistaken sentence. The immediate benefit to themselves, their families, or neighbours forms the boundary line of their vision, while the great interests of society are lost in a distant horizon. The judicial histories of all countries furnish examples of the most

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solemn denunciations of the unjustness of their judges, or the perjury of the witnesses against them, made by criminals the blackness of whose deeds and the justice of whose condemnation no rational being could doubt; and when we recollect the numerous instances which have occurred of persons making groundless confessions of *guilt* (*k*), we shall cease to be surprised at false asseverations of *innocence*.

(*k*) See *infrà*, chap. 7.

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Chapter III.

PRIMARY AND SECONDARY EVIDENCE.

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§ 472. The exaction of *original evidence* is unquestionably one of the most marked features of English law (*a*). And in the present chapter we propose to

Primary and *secondary* evidence.

(*a*) See Introd. pt. 1, § 29, and bk. 1, pt. 1, §§ 87—9.

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consider the application of this principle to the proof of instruments and documents, which are sufficiently identified by description, and proximate to the issues raised, to be at least primâ facie receivable in evidence. Such are said to be the "*Primary* evidence" of their own contents; and the term "*Secondary* evidence" is used to designate any derivative proof of them; such as memorials, copies, abstracts, recollections of persons who have read them, &c. It is a general and well-known rule, that no secondary evidence of a document can be received until an excuse, such as the law deems sufficient, is given for the nonproduction of the primary. Whether a proper foundation has been laid for the admission of secondary evidence is to be determined by the judge, and if this depends on a disputed question of fact he must decide it (*b*).

General rule—Secondary evidence not receivable until the non-production of the primary is accounted for.

§ 473. And here a question presents itself which is alike important and embarrassing—is this principle confined to evidence *in causâ*, or does it extend to evidence *extrà causam?* The following questions were put by the House of Lords, and the following answers given by the judges, during the proceedings against Queen Caroline, in 1820 (*c*). "First, Whether, in the courts below, a party, on cross-examination, would be allowed to represent in the statement of a question, the contents of a letter, and to ask the witness, whether the witness wrote a letter to any person with such contents, or contents to the like effect, without having first shewn to the witness the letter, and having asked that witness, whether the witness wrote that letter, and his admitting that he wrote such letter?" "Secondly, Whether, when a letter is produced in the courts below, the court would allow a witness to be asked, upon shewing the witness only a part of, or one or more lines of such

Whether this principle extends to evidence extrà causam? Answers of the judges in *Queen Caroline's case.*

(*b*) *Suprà*, bk. 1, pt. 1, § 82; *Harvey* v. *Mitchell*, 2 Moo. & R. 366; *Elmes* v. *Ogle*, 15 Jur. 180.

(*c*) 2 B. & B. 286—291.

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letter and not the whole of it, whether he wrote such part or such one or more lines; and, in case the witness shall not admit that he did or did not write the same, the witness can be examined to the contents of such letter?" "Thirdly, Whether, when a witness is cross-examined, and, upon the production of a letter to the witness under cross-examination, the witness admits that he wrote that letter, the witness can be examined in the courts below, whether he did not, in such letter, make statements such as the counsel shall, by questions addressed to the witness, inquire are or are not made therein; or whether the letter itself must be read as the evidence to manifest that such statements are or are not contained therein; and in what stage of the proceedings, according to the practice of the courts below, such letter could be required by counsel to be read, or be permitted by the court below to be read?" The first of these questions the judges answered in the negative; on the ground that "The contents of every written paper are, according to the ordinary and well established rules of evidence, to be proved by the paper itself, and by that alone, if the paper be in existence; the proper course, therefore, is to ask the witness, whether or no that letter is of the handwriting of the witness. If the witness admits that it is of his or her handwriting, the cross-examining counsel may, at his proper season, read that letter as evidence, and, when the letter is produced, then the whole of the letter is made evidence. One of the reasons for the rule requiring the production of written instruments is, in order that the court may be possessed of the whole. If the course, which is here proposed, should be followed, the cross-examining counsel may put the court in possession only of a part of the contents of the written paper; and thus the court may never be in possession of the whole, though it may happen, that the whole, if produced, may have an effect very different from that

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which might be produced by a statement of a part." The first part of the second question, namely, "Whether, when a letter is produced in the courts below, the court would allow a witness to be asked, upon shewing the witness only a part or one or more lines of such letter, and not the whole of it, whether he wrote such part?" the judges thought should be answered by them in the affirmative in that form; but to the latter, "and in case the witness shall not admit that he did or did not write such part, whether he can be examined as to the contents of such letter," they answered in the negative, for the reasons already given, namely, that the paper itself is to be produced, in order that the whole may be seen, and the one part explained by the other. To the first part of the third question Lord Chief Justice Abbott answered as follows:—"The judges are of opinion, in the case propounded, that the counsel cannot, by questions addressed to the witness, inquire whether or no such statements are contained in the letter; but, that the letter itself must be read to manifest whether such statements are or are not contained in that letter. In delivering this opinion to your lordships, the judges do not conceive that they are presuming to offer to your lordships any new rule of evidence, now, for the first time, introduced by them; but, that they found their opinion upon what, in their judgment, is a rule of evidence as old as any part of the common law of England, namely, that the contents of a written instrument, if it be in existence, are to be proved by that instrument itself, and not by parol evidence." To the latter part of the question he returned for answer, "the judges are of opiuion, according to the ordinary rule of proceeding in the courts below, the letter is to be read as the evidence of the cross-examining counsel, as part of his evidence in his turn, after he shall have opened his case; that that is the ordinary course; but that, if the counsel who is cross-

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examining, suggests to the court that he wishes to have the letter read immediately, in order that he may, after the contents of that letter shall have been made known to the court, found certain questions upon the contents of that letter, to be propounded to the witness, which could not well or effectually be done without reading the letter itself, *that* becomes an excepted case in the courts below, and, for the convenient administration of justice, the letter is permitted to be read at the suggestion of the counsel, but considering it, however, as part of the evidence of the counsel proposing it, and subject to all the consequences of having such letter considered as part of his evidence."

The foregoing questions and answers were followed by this(*d*): "Whether, according to the established practice in the courts below, counsel cross-examining are entitled, if the counsel on the other side object to it, to ask a witness whether he has made representations of a particular nature, not specifying in his question whether the question refers to representations in writing or in words?" Lord Chief Justice Abbott delivered the following answer of the judges:—"The judges find a difficulty to give a distinct answer to the question thus proposed by your lordships, either in the affirmative or negative, inasmuch as we are not aware that there is, in the courts below, any established practice which we can state to your lordships, as distinctly referring to such a question propounded by counsel on cross-examination, as is here contained; that is, whether the counsel cross-examining are entitled to ask the witness whether he has made such representation; for it is not in the recollection of any one of us that such a question, in those words, namely, 'whether a witness has made such and such representation,' has at any time been asked of a witness. Questions, however, of a similar nature are frequently asked at *nisi prius*, referring

(*d*) 2 B. & B. 292—294.

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rather to contracts and agreements, or to supposed contracts and agreements, than to declarations of the witness; as, for instance, a witness is often asked, whether there is an agreement for a certain price for a certain article,—an agreement for a certain definite time,—a warranty,—or other matter of that kind being a matter of contract; and, when a question of that kind has been asked at *nisi prius*, the ordinary course has been for the counsel on the other side, not to object to the question as a question that could not properly be put, but to interpose, on his own behalf, another intermediate question; namely, to ask the witness whether the agreement referred to in the question originally proposed by the counsel on the other side, was or was not in writing; and, if the witness answers that it was in writing, then the inquiry is stopped, because the writing must be itself produced. — My lords, therefore, although we cannot answer your lordships' question distinctly in the affirmative or the negative, for the reason I have given, namely, the want of an established practice referring to such a question by counsel; yet, as we are all of opinion that the witness cannot properly be asked, on cross-examination, whether he has written such a thing (the proper course being to put the writing into his hands, and ask him whether it be his writing), considering the question proposed to us by your lordships, with reference to that principle of law which requires the writing itself to be produced, and with reference to the course that ordinarily takes place on questions relating to contracts or agreements, we, each of us, think, that if such a question were propounded before us at *nisi prius*, and objected to, we should direct the counsel to separate the question into its parts. My lords, I find I have not expressed myself with the clearness I had wished, as to dividing the question into parts. I beg, therefore, to inform the House, that, by dividing the question into parts, I mean, that the counsel would be directed to ask

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whether the representation had been made in writing or by words. If he should ask, whether it had been made in writing, the counsel on the other side would object to the question; if he should ask whether it had been made by words, that is, whether the witness had said so and so, the counsel would undoubtedly have a right to put that question, and probably no objection would be made to it."

Examination of them.

§ 474. The rule that an advocate who has a document in his possession shall not represent its contents to a witness, may possibly be defended on the ground, that whoever uses a document in a court of justice has no right to suppress any part of it, or prevent its speaking for itself; although the fitness of extending even this principle to evidence extrà causam is not beyond dispute. But whether a witness may be asked, *with a view to test his memory or credit*, if he has ever made a representation, not specifying whether verbal or written; or has written a letter, not saying to whom, when, or under what circumstances; in which representation or letter he has made statements inconsistent with the evidence given by him in causâ, is a much larger question. It has been suggested that the above answers of the judges have not resolved this point in the negative, and that they were all based on the assumption that the letter was in the possession of the cross-examining counsel(*e*). In practice, however, a different construction is put upon them(*f*); and we should at once dismiss the sub-

(*e*) Ph. & Am. Ev. 932.

(*f*) *Macdonnell* v. *Evans*, 11 C. B. 930. In *Henman* v. *Lester*, 12 C. B., N. S. 776, 789, it was said by Willes, J., that the rules laid down in *Macdonnell* v. *Evans* and *The Queen's case*, were confined to cases in which the document would have been evidence upon the issue, or to contradict the witness if he had answered in a particular way; or in which the precise terms and language of the document were necessary to be referred to, in order to answer the question. And it was held by Willes and Keating, JJ., Byles, J., *dissentiente*, that the defendant

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ject, had not that practice been condemned by text writers on the law of evidence (*g*), and the practice founded on them been recently modified by the legislature (*h*). And here it may be doubted how far the proceedings in *Queen Caroline's case* are binding on tribunals, the answers of the judges to the House of Lords having no binding force *per se;* and although in that case the House adopted and acted on those answers, it was not sitting judicially, but with a view to legislation, which finally proved abortive.

§ 475. It can hardly escape notice that throughout the answers of the judges on the occasion in question, "written instrument" and "document" are assumed to be convertible terms—a fallacy which has led to more errors than one. A *letter* is not, at least in general, a written *instrument;* and therefore taking the maxim of the common law to be as stated by Abbott, C. J., a letter does not fall within its meaning. But is it true as a historical fact, that "it is a rule of evidence as old as any part of the common law of England that the contents of a written instrument," (à fortiori the contents of a written document not coming within the description of an instrument,) "if it be in existence, are *to be proved* by that instrument" (or document) "itself, and not by *parol* evidence?" And if this be so, is "parol evidence" here to be understood as comprehending every form of verbal, derivative, and extrinsic evidence? And is it further true that the rule has at every period of our legal history been applied to evidence extrà causam? and did the judges in *Queen Caroline's case* mean to convey this idea, when they spoke of how the contents of a written instru-

might be asked in cross-examination, whether in a previous proceeding in a county court, there had not been a verdict against him; although it was objected that this ought to be proved by the record of the verdict itself.

(*g*) Ph. & Am. Ev. 931 *et seq.*; Stark. Ev. 221—227, 4th Ed.; Tayl. Evid. § 1301, 4th Ed.

(*h*) See *infrà*.

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ment were to be proved? It would be difficult either to prove or disprove *directly*, what was the practice in former times in this respect relative to evidence extrà causam; so much of our actual law of evidence being of comparatively modern growth, and our ancient books affording very slender information as to what questions might be put in cross-examination, as distinguished from examination in chief. But it is by no means clear that, even in this latter case, our ancestors extended the principle requiring primary proof beyond records, deeds, and perhaps written instruments in general. The reasons given by the old lawyers for rejecting derivative or extrinsic evidence have manifest reference to such (*i*), while all other documents seem to have been considered as mere "parol." And this view seems supported by the traces of the ancient practice which have come down to us. In the State Trials we constantly find the contents of documents given by witnesses from recollection (*k*); but then the circumstance that those are the reports of state prosecutions, during very excited times, detracts from their value as accurate representations of the ordinary practice of the period. It is, however, tolerably certain that, so late at least as the latter end of the sixteenth century, all other forms of derivative evidence, such as hearsay, &c., were received as evidence in causâ, their weakness being only matter of observation to the jury (*l*). Now it seems improbable that while hearsay evidence was receivable *in chief* within three centuries of our own times, a witness could not, from the earliest period of English law, be asked in *cross-examination* either the contents of the most ordinary document, or whether he ever made a representation of some particular fact, because by possibility it might turn out that he had not done so verbally.

(*i*) See bk. 2, pt. 3.
(*k*) Bk. 1, pt. 2, § 115.
(*l*) Bk. 1, pt. 2, §§ 112, 114.

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§ 476. In dealing with this subject, much reliance is commonly placed on an analogy drawn from the rule of pleading which, previous to the 15 & 16 Vict. c. 76, s. 55, required profert to be made of deeds and some other species of writings. This seems founded chiefly on *Dr. Leyfield's case* (*m*), where it is stated that "the reason that deeds being so pleaded shall be shewed to the court, is, that to every deed two things are requisite and necessary; the one, that it be sufficient in law; and that is called the legal part, because the judgment of *that* belongs to the judges of the law; the other concerns matter of fact, sc. if it be sealed and delivered as a deed; and the trial thereof belongs to the country. And therefore every deed ought to approve itself, and to be proved by others: approve itself upon its shewing forth to the court in two manners. 1. As to the composition of the words to be sufficient in law, and the court shall judge that. 2. That it be not razed or interlined in material points or places, and upon that also in ancient time the judges did judge, upon their view, the deed to be void, as appears in 7 E. 3. 57. 25 E. 3. 41. 41 E. 3. 10. &c. but of late times the judges have left that to be tried by the jury, s. if the razing or interlining was before the delivery. 3. That it may appear to the court and to the party, if it was upon condition, limitation, or with power of revocation, &c. to the intent that if there be a condition, limitation, or power of revocation in the deed, if the deed be poll, or if there wants a counterpart of the indenture, the other party may take advantage of the condition, limitation, or power of revocation, and therewith Litt. c. Conditions, f. 90, 91. 40 Ass. 34 agree. And these are the reasons of the law, that deeds pleaded in court shall be shewed forth to the court." It was accordingly held in that case, that the defendant was bound to make profert of the letters-patent on which he rested his justification

(*m*) 10 Co. 92.

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of the trespass complained of; but whether what follows the passage just quoted is to be read as the language of the court or of the reporter, is not easy to say. "And therefore it appears, that it is dangerous to suffer any who by the law in pleading ought to shew the deed itself to the court, upon the general issue to prove in evidence to a jury by witnesses, that there was such a deed which they have heard and read; or to prove it by a copy: for the viciousness, rasures, or interlineations, or other imperfections in these cases, will not appear to the court; or peradventure the deed may be upon condition, limitation, with power of revocation; and by this way truth and justice, and the true reason of the common law, would be subverted. But yet in great and notorious extremities, as by casualty of fire, that all his evidences were burnt in his house, there if that should appear to the judges, they may, in favour of him who has so great a loss by fire, suffer him upon the general issue to prove the deed in evidence to the jury by witnesses, that affliction be not added to affliction; and if the jury find it, although it be not shewed forth in evidence, it shall be good enough, as appears in 28 Ass. p. 3. but in 12 Ass. p. 16. the judges would not suffer a deed to be given in evidence which was not shewed forth to the jury. Vide 26 Ass. p. 2. the like (*n*)." * * * * * * "Also (*o*) the deed ought not only, as hath been said, to approve itself, but it

(*n*) The two cases from the book of Assizes will be found, on examination, to fall very far short of the general proposition which they are cited to support. The 26 Ass. pl. 2 is a little obscure; but the 12 Ass. pl. 16 is as follows:— "Trove fuit per verdict d'assize, que les tenements fueront dones a B. et a R. per un chartre que voloit ceux parolx, Dedi, etc. Et les defendants fueront les files B. et R.; et le pl' le fitz B. d'une autre feme. Et pur ceo que garrañ ne chiet pas en lour conis. que deveront faire le tail, et la chartre ne fuit pas monstre en evidence ne pleđ, agarde fuit que le fitz recover, &c., uncore les files pleđ que la terre fuit doñ en tail, etc. Quære, si la charť ust este monstre; si la tail ust este ē les files."

(*o*) 10 Co. 93 a.

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ought to be proved by others, sc. by witnesses, that it was sealed and delivered; for otherwise although the fabric and composition of the deed be legal, yet without the other it is of no effect."

§ 477. Although one object of profert may have been to enable the court to judge, by inspection, of the sufficiency of the deed relied on, yet Serjeant Stephen, no mean authority on such matters, questions whether the practice originated in this view, and thinks that the producing the deed was only a compliance with the general rule of pleading, which requires all affirmative pleadings to be supported by an offer of some mode of proof(*p*). In ancient times, when a cause turned on a deed, the witnesses to the deed acted in some degree as a jury, and were brought in by a process analogous to a jury process (*q*); and the object of laying the deed before the court was to enable them to see whether it was sufficient in law if proved, and if so, to issue process to bring in the witnesses. In confirmation of this it is to be observed that, at least in general, no profert was required of a document not falling within the technical definition of a deed (*r*), however completely an action or defence might rest on it,—e. g. an agreement not under seal (*s*); or however indispensable its production at the trial, as a bill of exchange (*t*). And even of a deed no profert was required, unless the party pleading claimed or justified under it, nor even then unless he relied on its direct and intrinsic operation (*u*).

§ 478. But whatever value may be attributed to the

(*p*) Steph. Plead. 485; and Append. note 68, 5th Ed.

(*q*) Co. Litt. 6 b; Bro. Abr. tit. Testmoignes.

(*r*) Steph. Plead. 483, 5th Ed.

(*s*) *Id.*

(*t*) See *Ramuz* v. *Crowe*, 1 Exch. 167; *Clay* v. *Crowe*, 8 Exch. 295; *Jungbluth* v. *Way*, 1 H. & N. 71; *Aranguren* v. *Scholfield*, *Id.* 494; 17 & 18 Vict. c. 125, s. 87.

(*u*) Steph. Plead. 484, 5th Ed.

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analogy from the theory of profert, there are other analogies much more to the purpose the other way. All other forms of derivative and remote evidence; such as hearsay, res inter alios gestæ, opinion evidence, and the like, may, in most instances at least, be used to test the credit of witnesses; and even the judges in *Queen Caroline's case* concede, that a witness may be asked whether he ever made a *verbal* representation inconsistent with the evidence he has already given. Now, as it is indisputable that if that verbal representation were made to a third party it would not be evidence in chief, why is it evidence on cross-examination? The answer is obvious—that if the witness were untruly to deny having given a certain account of the transaction to which he has deposed, it would show a defect either in his memory or in his honesty; but does not this apply *à fortiori* to a statement reduced to writing, seeing that a man is less likely to forget what he has taken the pains to write down? Then it is said, a portion of the writing might be suppressed, so that the court and jury would not see the *whole* of it; but this argument would exclude the verbal representation; for this latter may have been made in a conversation part of which is suppressed, and the whole of which taken together, (the rest, be it observed, can be extracted on re-examination, or given by the witness himself in the way of explanation,) would give an entirely different colour to the matter. By requiring the document containing the supposed contradiction, to be put into the hands of the witness in the first instance, the great principle of cross-examination is sacrificed at once. When a man gives certain evidence, and the object is to show that he has on a former occasion given some different account, common sense tells us that the way of bringing about a contradiction is to ask him if he has *ever* done so; in order that he may have no intimation of the time, place, or circumstances alluded to, or consequently of what means are

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available to contradict and discredit him. Yet, according to the practice under the resolutions in *Queen Caroline's case*, if the witness had taken the precaution to reduce his previous statement to writing, the writing must be put into his hands, accompanied by the question whether he wrote it; thus giving him full warning of the danger he had to avoid, and full opportunity of shaping his answers to meet it.

Resolutions of the judges under 6 & 7 Will. 4, c. 114.

§ 479. The principles laid down by the judges in *Queen Caroline's case* were rather extensively applied. After the passing of the 6 & 7 Will. 4, c. 114, which allowed prisoners on trial for felony to make their full defence by counsel; twelve of the judges, having assembled to choose the spring circuits of 1837, agreed to the following, among other resolutions (*x*):—

"1. Where a witness for the crown has made a deposition before a magistrate, he cannot, upon his cross-examination by the prisoner's counsel, be asked whether he did or did not, in his deposition, make such or such a statement, until the deposition itself has been read, in order to manifest whether such statement is or is not contained therein; and such deposition must be read as part of the evidence of the cross-examining counsel.

"2. After such deposition has been read, the prisoner's counsel may proceed in his cross-examination of the witness, as to any supposed contradiction or variance between the testimony of the witness in court and his former deposition; after which the counsel for the prosecution may re-examine the witness, and, after the prisoner's counsel has addressed the jury, will be entitled to the reply. And in case the counsel for the prisoner comments on any supposed variance or contradiction, without having read the deposition, the court may direct it to be read, and the counsel for the prosecution will be entitled to reply upon it.

(*x*) 7 C. & P. 676.

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"3. The witness cannot, in cross-examination, be compelled to answer, whether he did or did not make such or such a statement before the magistrate, until after his deposition has been read, and it appears that it contains no mention of such statement. In that event the counsel for the prisoner may proceed with his cross-examination: and if the witness admits such statement to have been made, he may comment upon such omission, or upon the effect of it upon the other part of his testimony; or if the witness denies that he made such a statement, the counsel for the prisoner may then, if such statement be material to the matter in issue, call witnesses to prove that he made such statement. But in either event, the reading of the deposition is the prisoner's evidence, and the counsel for the prosecution will be entitled to reply."

Practice since those resolutions.

§ 480. Although these resolutions were not binding per se, not being the decision of a court in a judicial proceeding, they were followed in practice. And in order to prevent any evasion of them it was held, that a witness could not be asked on cross-examination, if he had ever made a statement inconsistent with his evidence in chief; but that the question must be guarded with the saving clause, that the party interrogating was not referring to what might have taken place before the committing magistrate (*y*), or coroner (*z*), as the case might be. The anticipating *possible* objections has been truly designated by C. J. Hale, "leaping before one comes to the stile" (*a*). Suppose the witness, instead of making the inconsistent statement on his examination before the committing magistrate or coroner, had made it by matter of record, or by deed, or even by letter, his parol account of it would, according to

(*y*) *R.* v. *Shellard*, 9 C. & P. 277.

(*z*) *R.* v. *Holden*, 8 C. & P. 606.

(*a*) 1 Ventr. 217.

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Queen Caroline's case, be inadmissible; still it was not thought necessary, to require the cross-examining counsel to negative these various hypotheses by the mode of putting his questions. Another question had also arisen. Although a witness could not be asked what he said before the committing magistrate, unless either his deposition was put in evidence, or it was proved that the testimony given by him on that occasion was not taken down in writing; if the witness had *signed* the deposition so made by him, might a cross-examining counsel at the trial, put it into his hand as a memorandum to refresh his memory, and ask him if, after having read it, he persisted in the evidence given by him in chief? This course was allowed in several instances (*b*), but was disallowed by some judges (*c*), and disapproved by others (*d*); and finally by the Court of Criminal Appeal (*e*).

Common Law Procedure Act, 1854—17 & 18 Vict. c. 125, ss. 24, 103.

§ 481. The answers of the judges in *Queen Caroline's case*, on which we have been commenting; opposed, as they were, to the most elementary principles of evidence, having for years been denounced by writers on the subject, and latterly by the Common Law Commissioners of 1850 (*f*), at length received the condemnation of the legislature. The 17 & 18 Vict. c. 125, s. 24, following almost verbatim the recommendation of those commissioners, enacts, "A witness may be cross-examined as to previous statements made by him in writing, or reduced into writing, relative to the subject-matter of the

(*b*) *R.* v. *Edwards*, 8 C. & P. 31; *R.* v. *Tooker*, and *R.* v. *Wilson*, Salop Sp. Ass. 1849, ex relatione; *R.* v. *Newton*, 2 Ph. Ev. 516, 10th Ed.; *R.* v. *Barnet*, 4 Cox, Cr. Ca. 269.

(*c*) Per Patteson, J., in *R.* v. *Newton*, 15 L. T. 26; per Parke, B., in *R.* v. *Lang*, Kingst. Sp. Ass. 1851, MS.

(*d*) See *R.* v. *Matthews*, 4 Cox, Cr. Cas. 93.

(*e*) *R.* v. *Ford*, 2 Den. C. C. 245; 5 Cox, Cr. Ca. 184; 3 Car. & K. 113.

(*f*) Second Report, p. 20.

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cause, without such writing being shewn to him; but if it is intended to contradict such witness by the writing, his attention must, before such contradictory proof can be given, be called to those parts of the writing which are to be used for the purpose of so contradicting him: Provided always, that it shall be competent for the judge, at any time during the trial, to require the production of the writing for his inspection, and he may thereupon make such use of it for the purposes of the trial as he shall think fit." By sect. 103, the enactments in this section are extended to every court of civil judicature in England and Ireland; and 28 Vict. c. 18, sects. 1 & 5, extends them to criminal cases.

28 Vict. c. 18, ss. 1 & 5.

Secondary evidence.
1. When admissible.

§ 482. It has been already stated, that when the absence of the primary source of evidence has been accounted for, secondary evidence is receivable (*g*). The excuses which the law allows for dispensing with primary evidence are, that the document has been destroyed or lost; or that it is in the possession of the adversary, who does not produce it after due notice calling on him so to do; or in that of a party privileged to withhold it, who insists on his privilege; or who is out of the jurisdiction of the court, and consequently cannot be compelled to produce it. Whether a sufficient foundation has been laid for admitting secondary evidence, is often a matter of nicety; and depends on whether sufficient proof has been given of the destruction or loss of the document; whether a notice to produce is required—as in many cases the proceedings amount to constructive notice, and in others notice to produce is dispensed with

(*g*) *Suprà*, § 472. "Quumque ex ea definitione adpareat, instrumenta rerum gestarum fidei ac memoriæ causâ confici: facile patet, eis amissis, jus non exspirare, nec ullam obligationem perimi, dum alia supersit probandi ratio:" Heinec. ad Pand. pars 4, § 133. See also Mascard. de Prob. Concl. 480, N. 4.

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by statute (*h*);—and if so, whether the notice given is sufficient in its terms, and has been given in proper time, &c. There are, however, some general principles which should always be borne in mind. First. Whether sufficient search has been made for a document, depends much on its nature and the circumstances of the case (*i*),—as a useless document may be presumed to have been lost or destroyed, on proof of a much less search, and after a much shorter time, than an important one. This subject is well illustrated in the case of *Gathercole* v. *Miall* (*k*), which was an action for a libel in a newspaper called "The Nonconformist." In order to prove the circulation of the libel, a witness was called who said he was president of a literary institution, which consisted of eighty members; that a number of "The Nonconformist" was brought to the institution, he did not know by whom, and left there gratuitously; that, about a fortnight afterwards, it was taken (as he supposed) out of the subscribers' room without his authority, and was never returned; that he had searched the room for it, but had not found it, and never knew who had it; and that he believed it had been lost or destroyed. Under these circumstances the judge at Nisi Prius held that secondary evidence of the contents of the paper was admissible. A new trial having been moved for on the ground that this evidence was improperly received, the Court held the ruling to be right. Alderson, B., in delivering his judgment, says (p. 335), "The question whether there has been a loss, and whether there has been sufficient search, must depend very much on the nature of the instrument searched for; and I put the case, in the course

(*h*) E. g. 17 & 18 Vict. c. 104, s. 165.

(*i*) *R.* v. *East Farleigh*, 6 D. & Ryl. 147; *Gathercole* v. *Miall*, 15 M. & W. 319; *Richards* v. *Lewis*, 15 Jur. 512; *R.* v. *Braintree*, 1 E. & E. 51; *Quilter* v. *Jorfs*, 14 C. B., N. S. 747.

(*k*) 15 M. & W. 319.

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of the argument, of the back of a letter. It is quite clear a very slender search would be sufficient to shew that a document of that description had been lost. If we were speaking of an envelope in which a letter had been received, and a person said, 'I have searched for it among my papers, I cannot find it,' surely that would be sufficient. So, with respect to an old newspaper which has been at a public coffee-room; if the party who kept the public coffee-room had searched for it there, where it ought to be if in existence, and where naturally he would find it, and says he supposes it has been taken away by some one, that seems to me to be amply sufficient. If he had said, 'I know it was taken away by A. B.,' then I should have said, you ought to go to A. B., and see if A. B. has not got that which it is proved he took away; but if you have no proof that it was taken away by any individual at all, it seems to me to be a very unreasonable thing to require that you should go to all the members of the club, for the purpose of asking one more than another, whether he has taken it away, or kept it. I do not know where it would stop; when you once go to each of the members, then you must ask each of the servants, or wives, or children of the members; and where will you stop? As it seems to me, the proper limit is, where a reasonable person would be satisfied that they had bonâ fide endeavoured to produce the document itself; and therefore I think it was reasonable to receive parol evidence of the contents of this newspaper." Secondly. According to some authorities, the object of a notice to produce is not merely to enable the party served to have the document in court; but also that he may be enabled to prepare evidence to explain, nullify, or confirm it (*l*). This notion has however been overruled, after argument and

(*l*) 1 Stark. Ev. 404, 3rd Ed.; *Cook* v. *Hearn*, 1 Moo. & R. 201; *Exall* v. *Partridge*, cited argu-endo in *Doe* d. *Wartney* v. *Grey*, 1 Stark. 283.

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full review of the cases, by the Court of Exchequer, in a case of *Dwyer* v. *Collins* (*m*); in which it was held, that the sole object of such a notice is to enable the party to have the document in court to produce it if he likes, and if he does not, then to enable the opponent to give secondary evidence. "If," said Parke, B., in delivering the judgment of the Court, "this (i. e. the reason suggested by the above authorities,) be the true reason, the measure of the reasonable length of notice would not be the time necessary to procure the document, a comparatively simple inquiry, but the time necessary to procure evidence to explain or support it, a very complicated one, depending on the nature of the case and the document itself and its bearing on the cause." And it was accordingly held in that case, that where a party to a suit, or his attorney, has a document with him in court, he may be called on to produce it without previous notice, and in the event of his refusing, the opposite party may give secondary evidence.

2. Nature of.

§ 483. The expression that secondary evidence of a document is receivable, must not be understood to mean that conjectural, or any other form of illegal evidence of it, will be received. Secondary evidence must be *legitimate* evidence, inferior to the primary solely in respect of its derivative character. Thus, the copy of a copy of a destroyed or lost document is not receivable in evidence, even though, as it seems, the absence of the first copy has been satisfactorily explained (*n*). So, previous to the 14 & 15 Vict. c. 99, s. 2, where a document was lost, a copy of it made by the party to the suit was not admissible, unless proved by evidence aliundè to be accurate; for as he was not a competent witness for

(*m*) 7 Exch. 639; 16 Jurist, 569.

(*n*) *Reeve* v. *Long*, Holt, 286; *Anon.*, Skinn. 174; *Liebman* v. *Pooley*, 1 Stark. 167; *Everingham* v. *Roundell*, 2 Moo. & R. 138; Gilb. Ev. 9, 4th Ed.

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himself, so what he wrote could not be evidence for him (*o*). And here it is of the utmost importance to remember that there are no *degrees* of secondary evidence (*p*). A party entitled to resort to this mode of proof may use any form of it; his not adducing, or even wilfully withholding some other, likely to be more satisfactory, is only matter of observation to the jury. Thus, the evidence of a witness who has read a destroyed or lost document is perfectly receivable, although a copy or abstract of it is in existence, and perhaps even in court. This rule, so elementary in its nature, was not established until the case of *Doe* d. *Gilbert* v. *Ross* (*q*) in 1840; previous to which, however, various dicta were to be found on the subject, and the prevailing opinion was rather the other way (*r*). But that decision is in perfect accordance with the general principles of evidence, and a contrary doctrine would open the widest door to fraud and chicane. At the trial of the case on the circuit, in order to prove, by secondary evidence, the contents of a marriage settlement, a copy which was tendered having been rejected for want of a stamp, a short-hand writer's notes of a former trial at which the settlement was proved were offered and received by the judge. The jury having found for the plaintiff, it was objected before the court in banc that this evidence ought not to have been received, especially as it appeared that a copy of the settlement was in existence; and several of the previous dicta were cited. The court, however, refused even a rule to shew cause on this point; Parke, B., in the course of the argument, observing to the counsel, p. 105, "You must contend then, that there is to be primary, secondary, and tertiary

No *degrees* of.

(*o*) *Fisher* v. *Samuda*, 1 Camp. 192—3.

(*p*) *Doe* d. *Gilbert* v. *Ross*, 7 M. & W. 102; *Hall* v. *Ball*, 3 Scott, N. R. 577; *Brown* v. *Woodman*, 6 Car. & P. 206.

(*q*) 7 M. & W. 102.

(*r*) The cases were collected by the author in the Monthly Law Mag., vol. 4, p. 265.

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evidence. If an attested copy is to be one degree of secondary evidence, the next will be a copy not attested; and then an abstract: then would come an inquiry, whether one man has a better memory than another, and we should never know where to stop." And in delivering judgment the same judge expressed himself thus, p. 107:—"As soon as you have accounted for the original document, you may then give secondary evidence of its contents. When parol evidence is then tendered, it does not appear from the nature of such evidence, that there is any attested copy, or better species of secondary evidence behind. We know of nothing but of the deed which is accounted for, and therefore the parol evidence is in itself unobjectionable. Does it then become inadmissible, if it be shown from other sources, that a more satisfactory species of secondary evidence exists? I think it does not; and I have always understood the rule to be, that when a party is entitled to give secondary evidence at all, he may give any species of secondary evidence within his power." And Alderson, B., said, "I agree with my brother Parke, that the objection must arise from the nature of the evidence itself. If you produce a copy which shews that there was an original, or if you give parol evidence of the contents of a deed, the evidence itself discloses the existence of the deed. But reverse the case,—the existence of an original does not shew the existence of any copy; nor does parol evidence of the contents of a deed shew the existence of anything except the deed itself. If one species of secondary evidence is to exclude another, a party tendering parol evidence of a deed must account for all the secondary evidence that has existed. He may know of nothing but the original, and the other side, at the trial, may defeat him by shewing a copy, the existence of which he had no means of ascertaining. Fifty copies may be

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in existence unknown to him, and he would be bound to account for them all" (*s*).

§ 484. There are several exceptions to the rule which requires primary evidence to be given. The following are the principal. First, where the production of it is physically impossible, as where characters are traced on a rock: or, secondly, where it would be highly inconvenient on *physical* grounds; as where they are engraven on a tombstone (*t*), or chalked on a wall or building (*u*), or contained in a paper permanently fixed to it (*x*), &c.

Exceptions to the rule requiring primary evidence.
1. Where production physically impossible.
2. Where highly inconvenient on *physical* grounds.

(*s*) In some parts of America they take a sort of middle course about this, which is thus described in 1 Greenl. Ev. § 84, note (2), 7th Ed. "The American doctrine, as deduced from various authorities, seems to be this; that if, from the nature of the case itself, it is manifest that a more satisfactory kind of secondary evidence exists, the party will be required to produce it; but that where the nature of the case does not of itself disclose the existence of such better evidence, the objector must not only prove its existence, but also must prove, that it was known to the other party in season to have been produced at the trial. Thus, where the record of a conviction was destroyed, oral proof of its existence was rejected, because the law required a transcript to be sent to the Court of Exchequer, which was better evidence. A grant of letters of administration was presumed, after proof from the records of various courts, of the administrator's recognition there, and his acts in that capacity; and where the record books were burnt and mutilated, or lost, the clerk's docket and the journals of the judges have been deemed the next best evidence of the contents of the record. In all these, and the like cases, the nature of the fact to be proved, plainly discloses the existence of some evidence in writing, of an official character, more satisfactory than mere oral proof; and therefore the production of such evidence is demanded. But where there is no ground for legal presumption that better secondary evidence exists, any proof is received, which is not inadmissible by other rules of law; unless the objecting party can shew that better evidence was previously known to the other, and might have been produced; thus subjecting him, by positive proof, to the same imputation of fraud, which the law itself presumes when primary evidence is withheld."

(*t*) *Tracy Peerage case*, 10 Cl. & F. 154.

(*u*) *Mortimer* v. *M'Callan*, 6 M. & W. 58, 63 and 68; *Sayer* v. *Glossop*, 2 Exch. 411, per Rolfe, B.; *Bruce* v. *Nicolopulo*, 11 Exch. 129.

(*x*) *R.* v. *Fursey*, 6 C. & P. 84; *Jones* v. *Tarleton*, 9 M. & W. 675.

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3. Where on *moral* grounds —Public documents.

§ 485. 3. The most important and conspicuous exception, however, is with respect to the proof of records (*y*), and other public documents of general concernment (*z*); the objection to producing which rests on the ground of *moral*, not physical inconvenience. They are, comparatively speaking, little liable to corruption, alteration, or misrepresentation—the whole community being interested in their preservation, and, in most instances, entitled to inspect them; while private writings, on the contrary, are the objects of interest but to few whose property they are, and the inspection of them can only be obtained, if at all, by application to a court of justice. The number of persons interested in public documents also renders them much more frequently required for evidentiary purposes; and if the production of the originals were insisted on, not only would great inconvenience result from the same documents being wanted in different places at the same time, but the continual change of place would expose them to be lost, and the handling from frequent use soon ensure their destruction. For these and other reasons (*a*), the law deems it better to allow their contents to be proved by derivative evidence, and to run the chance, whatever that may be, of errors arising from inaccurate transcription, either intentional or casual. But, true to its great principle of exacting the best evidence that the nature of the matter affords,

(*y*) *Dr. Leyfield's case*, 10 Co. 92 b; Doct. Placit. 201, 206; *Leighton* v. *Leighton*, 1 Str. 210.

(*z*) *Mortimer* v. *M'Callan*, 6 M. & W. 58; *Lynch* v. *Clarke*, Holt, 293; 3 Salk. 154. See *infrà*.

(*a*) It is said in some books that the reason why records may be proved by a copy is, that no rasure or interlineations shall be intended in them. *Dr. Leyfield's case*, 10 Co. 92 b; B. N. P. 227. But though this may be one reason, it is neither the only nor the principal one. The actual record must be produced on an issue of nul tiel record in the same court; and although it is a præsumptio juris et de jure that officers of courts of justice make up their records accurately, and keep them from being tampered with, so strong a presumption could hardly be made in favour of public books and documents not of a judicial character.

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the law requires this derivative evidence to be of a very trustworthy kind; and has defined with much precision the forms of it which may be resorted to in proof of the different sorts of public writings (*b*). Thus it must, at least in general, be in a *written* form, i. e. in the shape of a copy, &c., and, as already mentioned (*c*), must not be a copy of a copy. In very few, if in any, instances is *oral* evidence receivable to prove the contents of a record or public book which is in existence.

Different sorts of copies used for proof of documents.

§ 486. The principal sorts of copies used for the proof of documents are, 1. Exemplifications under the great seal. 2. Exemplifications under the seal of the court where the record is. 3. Office copies, i. e. copies made by an officer appointed by law for the purpose. 4. Examined copies. An examined copy is a copy sworn to be a true copy, by a witness who has compared it line for line with the original, or who has examined the copy while another person read the original. The document must be in a character and language that the witness understands (*d*), and he must also have read the whole of it (*e*). According to most authorities, when the latter of the above modes of examination is resorted to, it is unnecessary to call both the persons engaged in it,

(*b*) At first sight this may appear at variance with the maxim that there are no degrees in secondary evidence; but it does not fall within its principle. E. g., a party wants to prove the contents of a *private* document in the possession of his adversary, who refuses to produce it; and for this purpose calls a witness, who offers to state its contents from memory. How unjust would it be if the opposite party could exclude this evidence, hy shewing that a copy of the document was in existence, and which perhaps was even made the day before the trial, with the view of enabling him to raise the objection. See *suprà*, § 483. But this reasoning cannot apply in the case of a *public* document, which is kept in a known place, where every one may inspect and obtain a copy of it.

(*c*) *Suprà*, § 483.

(*d*) *Crawford Peerage case*, 2 Ho. Lo. Cas. 544—5.

(*e*) *Nelthrop* v. *Johnson*, Clayt. 142, pl. 259.

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or that they should have alternately read and inspected the original and copy; for that it ought not to be presumed that any person would wilfully misread a record (*f*). But in a modern case before a committee of privileges of the House of Lords, where, in order to prove a memorandum roll in the Court of Exchequer in Dublin, a witness produced a copy of the roll, which he said he had compared with the original, according to the usual custom of the office—the clerk in the office holding the original and reading it, while the witness held the copy, without changing hands—and what he heard the clerk read corresponded with what the witness saw in the copy, the committee held that this practice was incorrect; that the witness could not swear that the document produced was a close copy, and therefore it could not be received; that it was important it should be known that copies must be compared in a different manner, viz. by changing hands. The same witness on producing a copy of a statute roll having said, that, besides comparing it in the usual way in the office, he read it with the original himself, the document was received as evidence (*g*). The rule laid down in that case is not, however, always followed in practice. 5. Copies signed and certified as true, by the officer to whose custody the original is entrusted. 6. Photograph copies:—of all others the best for shewing any peculiarities that exist in the original document, and consequently invaluable in cases turning on those peculiarities; as, for instance, when the original is suspected of having been tampered with after the copy has been taken, &c. An examination of the cases, in which these various species of copies may be used as proof of public or other documents, would be altogether foreign to a work like the present; suffice it to say, that there are a few instances where none of them is receivable, and the original

(*f*) *Rolfe* v. *Dart*, 2 Taunt. 52; *Giles* v. *Hill*, 1 Campb. 471, note.

(*g*) *Slane Peerage case*, 5 Cl. & F. 42.

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must be produced. Of these the principal is where the gist of a party's action or defence lies in a record of the court where the cause is, and issue is joined on a plea of nul tiel record. Here it is obvious that the reasons which plead so strongly for allowing inferior evidence to prove records, &c. (*h*), do not apply: "Cessante ratione legis cessat ipsa lex" (*i*).

Proof of public documents.

§ 487. Public documents, though not of a judicial nature; such as registers of births, marriages and deaths (*k*); the books of the Bank of England (*l*), or of the East India Company (*m*); bank bills on the file at the Bank (*n*), &c., are, in general, provable by examined copies. And by 14 & 15 Vict. c. 99, s. 14, it is enacted, that "Whenever any book or other document is of such a public nature as to be admissible in evidence on its mere production from the proper custody, and no statute exists which renders its contents provable by means of a copy, any copy thereof or extract therefrom shall be admissible in evidence in any court of justice, or before any person now or hereafter having by law or by consent of parties authority to hear, receive, and examine evidence, provided it be proved to be an examined copy or extract, or provided it purport to be signed and certified as a true copy or extract, by the officer to whose custody the original is intrusted."

14 & 15 Vict. c. 99, s. 14.

Special modes of proof of public documents provided by modern statutes.

§ 488. By several modern acts of parliament, special modes of proof are provided for many kinds of records and public documents. By "The Documentary Evidence Act, 1868" (*o*), sect. 2, it is enacted as follows: "*Primâ*

31 & 32 Vict. c. 37, s. 2.

(*h*) *Suprà*, § 485.

(*i*) Co. Litt. 70 b.

(*k*) *Lynch* v. *Clarke*, Holt, 293; 3 Salk. 154; *Sayer* v. *Glossop*, 2 Exch. 409.

(*l*) *Mortimer* v. *M'Callan*, 6 M. & W. 58.

(*m*) *Shelling* v. *Farmer*, 1 Str. 646; note to the case of *R.* v. *Lord Geo. Gordon*, 2 Dougl. 593.

(*n*) *Man* v. *Cary*, 3 Salk. 155.

(*o*) 31 & 32 Vict. c. 37. Subject to any law that may from time to

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facie evidence of any proclamation, order, or regulation issued before or after the passing of this act by her majesty or by the privy council, also of any proclamation, order, or regulation issued before or after the passing of this act, by or under the authority of any such department of the government, or officer as is mentioned in the first column of the Schedule hereto (*p*), may be given in all courts of justice, and in all legal proceedings whatever, in all or any of the modes hereinafter mentioned, that is to say:—

"1. By the production of a copy of the 'Gazette' purporting to contain such proclamation, order, or regulation.

"2. By the production of a copy of such proclamation, order, or regulation purporting to be printed by the government printer, or, where the question arises in a court in any British colony or possession, of a copy purporting to be printed under the authority of the legislature of such British colony or possession.

"3. By the production, in the case of any proclamation, order, or regulation issued by her majesty or by the privy council, of a copy or extract purporting to be certified to be true by the clerk of the privy council, or by any one of the lords or others of the privy council, and, in the case of any proclamation, order, or regulation issued by or under the authority of any of the said departments or officers, by the production of a copy or extract purporting to be certified to be true, by the person or persons specified in the second column of the said Schedule in connexion with such department or officer (*q*).

time be made by the legislature of any British colony or possession, this act is to be in force in every such colony and possession; sect. 3.

(*p*) I. e.:—

The Commissioners of the Treasury;

The Commissioners for executing the Office of Lord High Admiral;

Secretaries of State;

Committee of Privy Council for Trade;

The Poor Law Board.

(*q*) I. e.:—

Any Commissioner, Secretary, or

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"Any copy or extract made in pursuance of this act may be in print or in writing, or partly in print and partly in writing.

"No proof shall be required of the handwriting or official position of any person certifying, in pursuance of this act, to the truth of any copy of or extract from any proclamation, order or regulation."

By the 7th section of the statute 14 & 15 Vict. c. 99, it is enacted, that "All proclamations, treaties and other acts of state, of any foreign state or of any British colony, and all judgments, decrees, orders, and other judicial proceedings of any court of justice in any foreign state or in any British colony, and all affidavits, pleadings, and other legal documents filed or deposited in any such court, may be proved in any court of justice, or before any person having by law or by consent of parties authority to hear, receive, and examine evidence, either by examined copies or by copies authenticated as hereinafter mentioned; that is to say, if the document sought to be proved be a proclamation, treaty, or other act of state, the authenticated copy to be admissible in evidence must purport to be sealed with the seal of the foreign state or British colony to which the original document belongs; and if the document sought to be proved be a judgment, decree, order, or other judicial proceeding of any foreign or colonial court, or an affidavit, pleading, or other legal document filed or deposited in any such court, the authenticated copy to be admissible in evidence must purport either to be sealed

14 & 15 Vict. c. 99, ss. 7, 12, 13.

Assistant Secretary of the Treasury;

Any of the Commissioners for executing the Office of Lord High Admiral, or either of the Secretaries to the said Commissioners;

Any Secretary or Under Secretary of State;

Any Member of the Committee of Privy Council for Trade, or any Secretary or Assistant Secretary of the said Committee;

Any Commissioner of the Poor Law Board, or any Secretary or Assistant Secretary of the said Board.

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with the seal of the foreign or colonial court to which the original document belongs, or, in the event of such court having no seal, to be signed by the judge, or, if there be more than one judge, by any one of the judges of the said court, and such judge shall attach to his signature a statement in writing on the said copy that the court whereof he is a judge has no seal; but if any of the aforesaid authenticated copies shall purport to be sealed or signed as hereinbefore respectively directed, the same shall respectively be admitted in evidence in every case in which the original document could have been received in evidence, without any proof of the seal where a seal is necessary, or of the signature, or of the truth of the statement attached thereto, where such signature and statement are necessary, or of the judicial character of the person appearing to have made such signature and statement." The 12th section relates to proof of the register of British vessels. And by sect. 13, "Whenever in any proceeding whatever, it may be necessary to prove the trial and conviction or acquittal of any person charged with any indictable offence, it shall not be necessary to produce the record of the conviction or acquittal of such person, or a copy thereof, but it shall be sufficient that it be certified or purport to be certified under the hand of the clerk of the court, or other officer having the custody of the records of the court where such conviction or acquittal took place, or by the deputy of such clerk or other officer, that the paper produced is a copy of the record of the indictment, trial, conviction, and judgment or acquittal, as the case may be, omitting the formal parts thereof."

8 & 9 Vict. c. 113, s. 3.

The 8 & 9 Vict. c. 113, s. 3, enacts, "All copies of private and local and personal acts of parliament not public acts, if purporting to be printed by the queen's printers, and all copies of the journals of either house of parliament, and of royal proclamations, purporting to be printed by the printers to the crown or by the printers

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to either house of parliament, or by any or either of them, shall be admitted as evidence thereof by all courts, judges, justices, and others, without any proof being given that such copies were so printed."

In general *cumulative*, not *substitutionary*.

Of these and similar enactments, of which a large number are to be found in the recent statute books, it is to be observed, that in general they are *cumulative*, not *substitutionary:* i. e. they do not abolish the common law mode of proof, and only provide a more easy or summary one, of which parties may, if they please, avail themselves (*r*).

4. Appointments of public officers.

§ 489. 4. Another exception is in the case of public officers. It is a general principle that a person's acting in a public capacity, is primâ facie evidence of his having been duly authorized so to do; and even though the office be one the appointment to which must be in writing, it is not, at least in the first instance, necessary to produce the document, or account for its non-production. The grounds of this have been examined in another place (*s*).

5. Examinations on the voir dire.

§ 490. 5. Where a witness is being interrogated on the *voir dire* with the view of ascertaining his competency, if that competency depends on written instruments he may state their nature and contents (*t*).

Circumstantial evidence not affected by the rule requiring primary evidence

§ 491. The principle of the rule in question being, that the secondary evidence borrows its force from the primary, of which, owing to the general infirmity of all derivative proof, it may not be a perfect representation, it follows that *circumstantial* evidence, when original

(*r*) See 31 & 32 Vict. c. 37, s. 6.

(*s*) *Suprà*, ch. 2, sect. 2, subsect. 4, § 356.

(*t*) Tayl. Ev. §§ 433 & 1242, 4th Ed. See also per Maule, J., in *Macdonnell* v. *Evans*, 11 C. B. 930.

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and proximate in its nature, is not affected by the rule (*u*). It is evidence in the *direct*, not in the *collateral* line, which falls within the exclusion. For the same reason it seems—although much has been said and written on both sides of the question—that *self-disserving* statements by a party against his own interest, are receivable as primary proof of documents; but this will be considered under the head of self-regarding evidence (*x*).

Nor *self-disserving* evidence.

(*u*) Bk. 1, pt. 1, § 88 *et seq.*, and *suprà*, ch. 1, § 295.
(*x*) *Infrà*, ch. 7.

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Chapter IV.

DERIVATIVE EVIDENCE IN GENERAL.

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§ 492. The infirmity of derivative or second-hand evidence, as compared with its original source, has been shewn in the Introduction to this work (*a*); and the danger of this kind of proof increases according to

Infirmity of derivative or second-hand evidence.

(*a*) Introd. pt. 1, §§ 29, 30; pt. 2, § 51.

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its distance from that source, and the number of media or instruments through which it comes to the cognizance of the tribunal (*b*). The five following forms of it were there enumerated: 1. Supposed oral evidence, delivered through oral. 2. Supposed written evidence, delivered through written. 3. Supposed oral evidence, delivered through written. 4. Supposed written evidence, delivered through oral. 5. Reported real evidence. The last of these (*c*), and the secondary evidence of documents which would be evidence if produced (*d*), have been already considered; and the present chapter will be devoted to the admissibility of derivative evidence in general.

Forms of it.

General rule—Not receivable as evidence in causâ.

§ 493. The general rule is, that derivative or second-hand proofs are not receivable as evidence *in causâ*—a rule which forms one of the distinguishing features of our law of evidence (*e*), and the gradual establishment of which has been already traced (*f*). The reasons commonly assigned for it are: 1. That the party against whom the proof is offered, has no opportunity of cross-examining the original source whence it is derived;—but this will not explain the rejection of second-hand evidence when it comes in a written form. 2. That assuming the original evidence truly reported, it was not itself delivered under the sanction of an oath. To this the same objection may be made: besides, the derivative evidence would not be the more receivable, if the original evidence were delivered under that sanction; for the statement of a third party made on oath, even in judicio, is not evidence against a person who was no party to the judicial proceeding.

Reasons commonly assigned for this.

True grounds of.

§ 494. The foundations of the rule lie much deeper

(*b*) Introd. pt. 1, §§ 29 and 30.
(*c*) See bk. 2, pt. 2, § 198.
(*d*) See the preceding chapter.
(*e*) Introd. pt. 1, § 29, and bk. 1, pt. 1, § 89.
(*f*) Bk. 1, pt. 2.

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than this. Instead of stating as a maxim that the law requires all evidence to be given *on oath*, we should say that the law requires all evidence to be given *under personal responsibility*; i. e. every witness must give his testimony, under such circumstances as expose him to all the penalties of falsehood which may be inflicted by any of the sanctions of truth (*g*). Now oaths, so far from being the sole sanction of truth, are only a particular, although doubtless very effective, application of *one*, namely, the religious sanction (*h*); and if they were abolished, the rule rejecting second-hand evidence ought to remain exactly as it is. Indeed, several classes of persons are excused by statute from taking oaths (*i*), and their evidence, given on solemn affirmation, stands on the same footing with relation to admissibility as if they had been sworn. The true principle therefore appears to be this — that all second-hand evidence, whether of the contents of a document or of the language of a third person, which is not connected by *responsible* testimony with the party against whom it is offered, is to be rejected. And this will explain a matter which at first view seems anomalous; namely, that the principle governing *secondary* does not extend to *second-hand* evidence; for in the latter case, no matter how unanswerably the absence of the original source is accounted for, the inferior evidence will not be received. Thus, what A. (a witness) has heard B. (a stranger) say, is not only not admissible in the first instance, but the clearest proof of the death, or of the complete and incurable lunacy of B., would not render it admissible. The reason is that, in the one case, the primary source being perfect in itself, and receivable in evidence if produced, so soon as that source is exhausted, the evidence offered is simply derivative of it, and excludes all possible chances of error except those which may be found in

(*g*) Introd. pt. 1, §§ 16 *et seq.*
(*h*) Introd. pt. 2, §§ 56 *et seq.*
(*i*) See bk. 2, pt. 1, chap. 2, § 166.

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the medium of evidence used. But when the document is one which would not be evidence if produced, as not being traced to the party against whom it is offered; or where the proof tendered consists of the statement of a person who cannot be subjected to cross-examination, the primary source is not exhausted, and derivative proof is rightly rejected.

Maxim "hearsay is not evidence."
Inaccuracy of it.

§ 495. The rule in question is commonly enunciated, both in the books and in practice, by the maxim, "hearsay is not evidence,"—an expression inaccurate in every way, and which has caused the true nature of the rule to be very generally misunderstood. The language of this formula conveys two erroneous notions to the mind; first, directly, that what a person has been heard to say is not receivable in evidence; and, secondly, by implication, that whatever has been committed to writing, or rendered permanent by other means, is receivable—positions neither of which is even generally true. On the one hand, what a man has been heard to say against his own interest is not only receivable, but is the very best evidence against him (*j*); and on the other, as already stated (*k*), written documents with which a party is not identified are frequently rejected. Hence it is that hearsay evidence is so often confounded with *res gestæ*, i. e. the original proof of what has taken place; and which the least reflection will shew may consist of *words* as well as of *acts*. Thus on an indictment for treason in leading on a riotous mob, evidence of the cry of the mob is not hearsay, and is as original as any evidence can be (*l*); and so are the cries of a woman who is being ravished (*m*). So, where an action on a policy of insurance, effected by a deceased person on his own

Hearsay often confounded with *res gestæ*.

(*j*) See *infrà*, ch. 7.

(*k*) *Suprà*, § 494.

(*l*) Case of *Damaree* and *Purchase*, Fost. Cr. Law, 213; 15 Ho. St. Tr. 522; *R.* v. *Lord George Gordon*, 21 Ho. St. Tr. 514, 529.

(*m*) See Mascard. de Prob. Concl. 23, N. 1.

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life, was defended on the ground that he had no interest in the policy; evidence that, previous to effecting the insurance, the deceased had consulted another person on the subject of insuring his own life, was held to be admissible as part of the *res gestæ* (*n*). So, although the relation of what a stranger has been heard to say will be rejected, if offered as evidence of the truth of his words, seeing that it comes *obstetricante manu;* yet whether certain words were spoken is a *fact,* and may be proved as such, if relevant to the issue raised. Thus, although common rumour cannot be received as proof of a fact,—being hearsay in one of its worst forms, —yet when the conduct of a person is in question, evidence as to whether a certain rumour had reached his ears at a particular time, may be perfectly receivable (*o*). We are not to consider whether evidence comes by word of mouth or by writing, but whether it is original in its nature, or indicates any better source from which it derives its weight.

Common rumour, when evidence.

§ 496. There are several exceptions to the rule excluding second-hand evidence; and it will be found, on examination, that in almost, if not in all the cases where the rule has been relaxed, the derivative evidence received, is guarded by some security which renders it more trustworthy than derivative evidence in general. First, then, on a second trial of a cause between the same parties, the evidence of a witness examined at the former trial, and since deceased, is receivable; and may be proved by the testimony of a person who heard it, or by notes made at the time (*p*). Here the evidence was originally delivered under responsibility, and the party against whom it is offered had on a former occasion the

Exceptions to the rule excluding derivative or second-hand evidence

1. Evidence of deceased witness on former trial between the same parties.

(*n*) *Shilling* v. *The Accidental Death Company*, 4 Jurist, N. S. 244, per Erle, J. And see *Milne* v. *Leisler*, 7 H. & N. 786.

(*o*) 2 Inst. 52; T. 1 Edw. II. 12, tit. Imprisonment; *Jones* v. *Perry*, 2 Esp. 482; *Thomas* v. *Russell*, 9 Exch. 764. See Goodeve, Evidence, 423.

(*p*) 1 Phill. Ev. 306, 10th Ed.

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opportunity for cross-examination: still the benefit of the demeanour of the witness in giving it is lost. So by the 11 & 12 Vict. c. 42, s. 17, where a witness who has been examined before a justice of the peace, against a person charged with an offence, dies before the trial of the accused, or is so ill as to be unable to travel, his deposition, reduced to writing and signed by the justice, may be received in evidence (*q*).

2. Matters of public and general interest.

§ 497. 2. The next exception is in the proof of matters of public and general interest; such as the boundaries of counties or parishes, rights of common, claims of highway, &c. (*r*). We have seen that in proof of historical facts,—of what has taken place in by-gone ages,—derivative evidence must not only from necessity be resorted to, but that it is disarmed of much of its danger, from the permanent effects which are visible to confirm or contradict it, the number of sources whence it may spring, the number of persons interested in preserving the recollection of the matters in question; and the consequent facilities for detecting false testimony (*s*). Now it is obvious, that rights of public or general interest which are supposed to have been exercised in times past, partake in some degree of the nature of historical facts, and especially in this, that it is rarely possible to obtain original proof of them. The law accordingly allows them to be proved by general reputation:—E. g. by the declarations of deceased persons who may be presumed to have had competent knowledge on the subject (*t*); by old documents of various kinds, which, under ordinary circumstances, would be rejected for want of originality, &c. But in

Must be "ante *litem motam.*"

(*q*) Bk. 1, pt. 1, § 105.

(*r*) See as to this, very fully, *Reg.* v. *Inhabitants of Bedfordshire*, 4 E. & B. 535, 542. See also, 1 Phill. Ev. ch. 8, sect. 3, 10th Ed.; Tayl. Ev. Part. 2, ch. 8, 4th Ed. See Mascard. de Prob. Concl. 287, 395—403.

(*s*) Introd. pt. 2, §§ 50 *et seq.*

(*t*) See *Crease* v. *Barrett*, 1 C., M. & R. 919.

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order to guard against fraud, it is an established principle that such declarations, &c., must have been made "ante *litem motam*,"—an expression which has caused some difference of opinion, but which seems to mean, before any *controversy* has arisen on the subject to which the declarations relate, whether such controversy has or has not been made the subject of a lawsuit (*u*). The value of this species of evidence, manifestly depends on the degree of publicity of the matters in question; and also, when in a documentary shape, on the facilities or opportunities which may exist for substitution or fabrication.

3. Matters of pedigree.

§ 498. 3. Matters of pedigree: E. g. the fact of relationship between particular persons; the births, marriages, and deaths of members of a family, &c., form the next exception (*x*). "Quoties quæreretur, genus vel gentem quis haberet, necne, eum probare oportet" (*y*). These likewise partake of the nature of historical facts in this, that they usually refer to matters which have occurred in times gone by, and among persons who have passed away; though in attempting to prove them by derivative evidence the check afforded by notoriety is wanting, seeing that they are matter of interest to only one, or at most a few families. Still the extreme difficulty of procuring any better evidence compels the reception of this, when it comes from persons most likely to be acquainted with the truth, and under no temptation to misrepresent it. Thus declarations of deceased members of a family, made of course "ante *litem motam*" (*z*); the general reputation of a family proved by a surviving member of it; entries contained

Must be "ante *litem motam*."

(*u*) 1 Phill. Ev. 194, 10th Ed.; Tayl. Ev. §§ 515 *et seq.*, 4th Ed.; *Butler* v. *Lord Mountgarrett*, 7 Ho. Lo. Cas. 633.

(*x*) 1 Phill. Ev. ch. 8, sect. 4, 10th Ed.; Tayl. Ev. Part 2, ch. 9, 4th Ed.; *Att.-Gen.* v. *Köhler*, 9 Ho. Lo. Cas. 654, 670.

(*y*) Dig. lib. 22, tit. 3, l. 1.

(*z*) See 1 Phill. Ev. 206, 10th Ed.; *Gee* v. *Ward*, 7 E. & B. 509.

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in books, such as family bibles, if produced from the proper custody, even although there be no evidence of the handwriting or authorship of such entries (*a*); correspondence between relatives; recitals in deeds; descriptions in wills; inscriptions on tombstones, rings, monuments, or coffin plates; charts of pedigrees, made or adopted by deceased members of the family, &c., have severally been held receivable in evidence for this purpose (*b*). And it is impossible to dispense with this kind of evidence, especially in proof of remote and collateral matters; but tribunals should be on their guard, when the actual point in issue in a cause depends wholly or chiefly upon it. It is from its nature very much exposed to fraud and fabrication; and even assuming the declaration, inscription, &c. correctly reported by the medium of evidence used, many instances have shewn how erroneous is the assumption, that all the members of a family, especially in the inferior walks of life, are even tolerably conversant with the particulars of its pedigree (*c*).

4. Ancient possession.

§ 499. 4. The next instance in which this rule is relaxed seems to rest even more exclusively on the principle of necessity; namely, that ancient documents, purporting to constitute part of, or at least to have been executed contemporaneously with, the transactions to which they relate, are receivable as evidence of ancient possession, in favour of those claiming under them, and even against others who are neither parties nor privies to them (*d*). "The proof of ancient possession is always

(*a*) *Hubbard* v. *Lees*, L. Rep., 1 Ex. 255, 258.

(*b*) In a suit in which the plaintiff alleged that he was the natural son of A., a declaration by a deceased brother of A., that the plaintiff was A.'s natural son, was held to be inadmissible. *Crispin* v. *Doglioni*, 32 L. J., P. & M. 109.

(*c*) See the judgment of the Master of the Rolls in *Crouch* v. *Hooper*, 16 Beav. 182.

(*d*) 1 Phill. Ev. ch. 8, sect. 5, 10th Ed.; Tayl. Ev. Part 2, ch. 10, 4th Ed.

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attended with difficulty. Time has removed the witnesses who could prove acts of ownership of their personal knowledge, and resort must necessarily be had to written evidence" (*e*). In order to guard against the too manifest dangers of this kind of proof, it is established as a condition precedent to its admissibility, that the document must be shewn to have come from the proper custody, i. e. to have been found in a place in which, and under the care of persons with whom, it might naturally and reasonably be expected to be found (*f*); although it is no objection that some other *more* proper place, &c. may be suggested (*g*). The elder civilians applied, with tolerable justice, the term "piscatio anguillarum" to the proof of immemorial possession (*h*).

5. Declarations by deceased persons against their interest.

§ 500. 5. Declarations made by deceased persons against their own interest, are receivable in evidence in proceedings between third parties (*i*), provided such declarations were made against *proprietory* (*j*) or *pecuniary* interest (*k*), and do not derogate from the title of third parties; e. g. a declaration made by a deceased tenant, is not admissible if it derogates from the title of the reversioner (*l*).

The admissibility of declarations against interest

(*e*) Per Willes, J., delivering the opinion of the judges in *Malcomson* v. *O'Dea*, 10 Ho. Lo. Cas. 593, 614.

(*f*) *The Bishop of Meath* v. *The Marquess of Winchester*, 3 Bingh. N. C. 200, 202.

(*g*) *Id.*; *Croughton* v. *Blake*, 12 M. & W. 205; *R.* v. *Mytton*, 2 E. & E. 557.

(*h*) Bonnier, Traité des Preuves, § 732.

(*i*) 1 Phill. Ev. ch. 8, sect. 7; Tayl. Ev. Part 2, ch. 11, 4th Ed. The leading case on this subject is *Higham* v. *Ridgway*, 10 East, 109; set out and commented on in 2 Smith, Lead. Cas. 271, 5th Ed.

(*j*) *Reg.* v. *Exeter*, L. Rep., 4 Q. B. 341.

(*k*) *The Sussex Peerage case*, 11 Cl. & F. 85. See *R.* v. *The Overseers of Birmingham*, 1 B. & S. 763.

(*l*) *Papendick* v. *Bridgwater*, 5 E. & B. 166.

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made by parties to a suit rests on a different principle (*m*). The ground of this exception is, the improbability that a party would falsely make a declaration to fix himself with liability; but cases may be put where his doing so would be an advantage to him. E. g. the accounts of the receiver or steward of an estate have, through neglect or worse, got into a state of derangement, which it is desirable to conceal from his employer; and one very obvious way of setting the balance straight, is by falsely charging himself with having received money from a particular person.

6. Declarations by deceased persons in the regular course of business, &c.

§ 501. 6. Allied to these are declarations in the regular course of business, office, or employment, by deceased persons, who had a personal knowledge of the facts, and no interest in stating an untruth (*n*). But the rule as to the admission of such evidence, is confined strictly to the particular thing which it was the duty of the person to do; and, unlike a statement against interest, does not extend to collateral matters, however closely connected with that thing (*o*). And it is also a rule with regard to this class of declarations, that they must have been made *contemporaneously* with the acts to which they relate (*p*).

It seems that neither of these classes of declarations need be in a written form.

§ 502. In both classes, viz. declarations against interest, and declarations in the regular course of business, &c., the evidence commonly appears in a written form; and it has even been made a question whether

(*m*) *Infrà*, ch. 7.

(*n*) 1 Phill. Ev. ch. 8, sect. 8; Tayl. Ev. Part 2, ch. 12, 4th Ed. For the authorities on this subject, see the note in 1 Smith, Lead. Cas. 277, 5th Ed., to the case of *Price* v. *The Earl of Torrington* (reported 1 Salk. 285; 2 Ld. Raym. 873; Holt, 300).

(*o*) Per Blackburn, J., *Smith* v. *Blakey*, L. Rep., 2 Q. B. 326, 332.

(*p*) *Doe* d. *Patteshall* v. *Turford*, 3 B. & Ad. 898, per Parke, J.; *Short* v. *Lee*, 2 Jac. & W. 475, per Sir T. Plumer, M. R.

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this is not essential to its admissibility (*q*). But the inclination of the authorities is rather to the effect, that *verbal* declarations, answering of course all other requisite conditions, are equally receivable (*r*); and indeed it seems difficult to establish a distinction in principle between the cases.

7. Tradesmen's books.

§ 503. 7. The civil law (*s*), and the laws of some other countries (*t*), receive the books of tradesmen, made or purporting to be made by them in the regular course of business, as evidence to prove a debt against a customer or alleged customer. Sensible of the weakness and danger of this sort of evidence, the civilians only allowed it the force of a semi-proof; and, by thus investing it with an artificial value, increased the danger of receiving it (*u*). There is no analogy between entries made in his books by a living tradesman, and entries made in those books by a clerk or servant who is deceased, and who, in making them, probably charged himself to his master. And turn or torture this question

(*q*) *Fursdon* v. *Clogg*, 10 M. & W. 572.

(*r*) *Sussex Peerage case*, 11 Cl. & F. 113, per Ld. Campbell; *Stapylton* v. *Clough*, 2 E. & B. 933; *Edie* v. *Kingsford*, 14 C. B. 759, 763.

(*s*) Heinec. ad Pand. pars 4, § 134; 1 Ev. Poth. § 719. This is the well-known doctrine of the civilians, which was implanted by them in most countries of Europe, and at one period seems to have obtained a footing in our own. See 7 Jac. 1, c. 12. But it may well be a question whether the doctrine was derived from the *Roman* law; if so, it is wholly at variance with the principles laid down in other parts of the Corpus Juris Civilis. E. g. "Exemplo perniciosum est, ut ei scriptnræ credatur, quâ unusquisque sibi adnotatione propriâ debitorem constituit. Unde neque fiscum, neque alium quemlibet ex suis subnotationibus debiti probationem, præbere posse oportet." Cod. lib. 4, tit. 19, l. 7. "Factum cuique suum, non adversario nocere debet." Dig. lib. 50, tit. 17, l. 155. See also Dig. lib. 2, tit. 14, l. 27, § 4; Cod. lib. 7, tit. 60, ll. 1 & 2.

(*t*) Tayl. Ev. §§ 641—3, 4th Ed.

(*u*) Heinec. in loc. cit. See Bentham's comment on the civil law practice in this respect, 5 Jud. Ev. 481, 482; and *suprà*, Introd. pt. 2, § 70, note (*f*).

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as we will, to admit the former is a violation of the rule, alike of law and common sense, that a man shall not be allowed to manufacture evidence for himself(*x*). It is true that tradesmen's books are usually kept with tolerable, and in some instances with great accuracy; but may not the reason of this be, that as the law will not allow them to be used for the purpose of fraudulently charging others, they are now kept for the sole and bonâ fide purpose, of refreshing the memory of the tradesman as to what goods he has supplied? Besides, it is to be observed, that almost all the advantage derivable from tradesmen's books, with little or none of their danger, is obtained under the law as it now stands. For not only may the tradesman appear as a witness(*y*), and use his books as memoranda to refresh his memory with respect to the goods supplied(*z*); but those books are always available as "indicative" evidence(*a*), and, especially in the event of the bankruptcy of the tradesman, they are often found of immense value to himself or those who represent him.

8. Books of deceased incumbent.

§ 504. 8. Books of a deceased incumbent—rector or vicar—containing receipts and payments by him relative to the living, have frequently been held receivable in evidence for his successors(*b*). This has been complained of as anomalous(*c*); but the admissibility of such evidence was fully recognized in the comparatively recent case of *Young* v. *The Master of Clare Hall*(*d*); where, however, the court assigned no reason for their decision, apparently deeming the question settled by authority. So evidence has been admitted, of declara-

(*x*) *Infrà*, ch. 5 and ch. 7.
(*y*) Bk. 2, pt. 1, ch. 2.
(*z*) Bk. 2, pt. 3, ch. 1.
(*a*) For "indicative evidence," see bk. 1, pt. 1, § 93.
(*b*) See the cases collected, 1 Phill. Ev. 267—9, 10th Ed.
(*c*) 1 Ph. Ev. in loc. cit.
(*d*) 17 Q. B. 529.

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tions by a deceased rector, as to a custom in the parish relative to the appointment of churchwardens (*e*).

9. Dying declarations.

§ 505. 9. The last exception to this rule is that of declarations made by persons under the conviction of their impending death (*f*). "Nemo moriturus præsumitur mentiri" (*g*)—the circumstances under which such declarations are made, may fairly be assumed to afford a guarantee for their truth, at least equal to that of an oath taken in a court of justice. Hence the dying declarations of a child of tender years will be rejected, unless he appears to have had that degree of religious knowledge which would render his oath receivable (*h*); as likewise will those of an adult, whose character shews him to have been a person not likely to be affected with a religious sense of his approaching dissolution (*i*).

The principal objection however to second-hand evidence is, not that it is not guarded by an oath, but that the party against whom it is offered is deprived of his power of cross-examining, and the jury of the opportunity of observing the demeanour of, the person whose testimony is relied on. Besides, if the solemnity of the occasion on which dying declarations are made constituted their *sole* ground of admissibility, it would not be confined, as it appears to be by law, to a solitary class of cases, i. e., charges of homicide, where the language of the deceased referred to the injury which he expected would shortly cause his death (*k*). Two other reasons

(*e*) *Bremner* v. *Hull*, L. Rep., 1 C. P. 748.

(*f*) *Reg.* v. *Jenkins*, L. Rep., 1 C. C. 187; 1 Phill. Ev. ch. 8, sect. 6, 10th Ed.; Tayl. Ev. Part 2, ch. 13, 4th Ed.

(*g*) 2 Ho. St. Tr. 18.

(*h*) Bk. 2, pt. 1, ch. 2.

(*i*) 1 Phill. Ev. 242, 10th Ed.; Appleton, Evid. 203, note (*v*).

(*k*) *R.* v. *Mead*, 2 B. & C. 605, 608; *R.* v. *Hind*, Bell, C. C. 253. Some old cases in which such declarations were received in civil proceedings seem overruled by *Stobart* v. *Dryden*, 1 M. & W. 615, 626.

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plead for the reception of this evidence in those cases. 1. The difficulty of procuring better proof of the fact—the injured party being no more, the most obvious and direct source of evidence has perished. 2. Although society has an immense interest in punishing crimes of such magnitude, the witnesses who appear to prove them rarely have an interest, in putting into the mouths of the dying persons language which they did not use. In civil matters it is far otherwise; as fatal experience has taught men in all countries where nuncupative wills have been allowed.

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Chapter V.

EVIDENCE AFFORDED BY THE WORDS OR ACTS OF OTHER PERSONS.

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§ 506. "Res inter alios acta alteri nocere non debet" (*a*). "Res inter alios actæ alteri nocere non debent" (*b*). No person is to be affected by the words or acts of others unless he is connected with them either personally, or by those whom he represents or by whom he is represented. To the above forms of the maxim, some books add, "sed quandoque prodesse potest" (*c*), or "sed podesse possunt" (*d*); and in some it runs, "nec nocere nec prodesse possunt" (*e*). These additions are, however, unnecessary; for the rule is only of general, not universal application, there being several exceptions

Maxim "Res inter alios acta alteri nocere non debet."

Other forms of it.

(*a*) Co. Litt. 152 b, 319 a; 2 Inst. 513; 6 Co. 51 b; Broom's Max. 857, 3rd Ed. This rule was well known at Rome. "Inter alios res gestas aliis non posse præjudicium facere, sæpe constitutum est:" Cod. lib. 7, tit. 60, l. 1. "Inter alios factam transactionem, absenti non posse facere præjudicium, notissimi juris est:" *Id.* l. 2. See also Dig. lib. 2, tit. 14, l. 27, § 4. So in the canon law, "Res inter alios acta aliis præjudicium regulariter non adfert." Lancel. Inst. Jur. Can. lib. 3, tit. 15, § 10.

(*b*) 12 Co. 126.

(*c*) Wingate's Max. 327.

(*d*) 6 Co. 1 b.

(*e*) 4 Inst. 279. See also Bonnier, Traité des Preuves, § 692; and Cod. lib. 7, tit. 56, l. 2.

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both ways. Neither does the expression "inter alios" mean that the act must be the act of more than one person; it being also a maxim of law "factum unius alteri nocere non debet" (*f*). And the Roman law, from which both maxims were probably taken, expressly says, "Exemplo perniciosum est, ut ei scripturæ credatur, quâ unusquisque sibi adnotatione propriâ debitorem constituit" (*g*). Nor does it make any difference that the act was done or confirmed by oath,—"jusjurandum inter alios factum nec nocere, nec prodesse debet" (*h*);—consequently the sworn evidence of a witness in a cause or proceeding, cannot be made available in another cause or proceeding between other parties. One important branch of this rule, "res inter alios *judicata* alteri nocere non debet," will be more properly considered under the head of res judicata (*i*). When the person whose words or acts are offered in evidence, is also the opposite party to the suit, the evidence is further inadmissible by virtue of another important principle—that no man shall be allowed to make evidence for himself (*k*);—which also is in accordance with the Roman law, where it is laid down, "Factum cuique suum, non adversario nocere debet" (*l*).

Extent of it.

Distinction between "res inter alios acta" and derivative evidence.

§ 507. Following out the great principle which exacts the best evidence, it is obvious that things done *inter alios* or *ab alio* are even more objectionable than derivative or second-hand evidence. The two are, indeed, sometimes confounded; but there is this distinction between them; that derivative or second-hand evidence indicates *directly* a source of legitimate evidence, while res inter alios acta either indicates no such source, or at

(*f*) Co. Litt. 152 b.
(*g*) Cod. lib. 4, tit. 19, l. 7; 1 Ev. Poth. § 724.
(*h*) 4 Inst. 279. See Dig. lib. 12, tit. 2, l. 3, § 3, and l. 9, § 7, and l. 10.
(*i*) *Infrà*, ch. 9.
(*k*) See *infrà*, ch. 7.
(*l*) Dig. lib. 50, tit. 17, l. 155.

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most only indirectly. Suppose, for instance, that, on an indictment for larceny, A. were to depose that he heard B., (a person not present,) say that he saw the accused take and carry away the property, this evidence is objectionable as being offered *obstetricante manu;* but it indicates a better source, namely B. Suppose, however, C. were to depose that he overheard two persons unknown, forming a plan to commit the theft in question, in which they spoke of the accused as an accomplice who would assist them in its execution; this evidence is but res inter alios acta, for it shews no better source of legal proof; although as indicative evidence, and thus putting officers of justice, &c. on a track, it certainly might not be without its use.

The maxim does not exclude proof of res gestæ.

§ 508. There is likewise this point of resemblance between second-hand evidence and res inter alios acta, that the latter, like the former, must not be understood as excluding proof of res gestæ. The true meaning of the rule under consideration is simply this, that a party is not to be affected by what is done behind his back. But when the matter in issue consists of an act which is separable from the person of the accused, who is nevertheless accountable for it, proof may be given of that act before he is connected with it by evidence. This is best illustrated in criminal cases. Offences, as has been shewn in a former place (*m*), are rightly divisible into *delicta facti permanentis* and *delicta facti transeuntis*, i. e. into offences which leave traces or marks; such as homicide, arson, burglary, &c.; and offences which do not; such as conspiracy, criminal language, and the like. With respect to the former, it is every day's practice to give proof of a corpus delicti — that a murder, an arson, a burglary, &c. was committed — before any evidence is adduced affecting the accused, although without such evidence the antecedent proof of

(*m*) *Suprà*, ch. 2, sect. 3, sub-sect. 2.

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course goes for nothing. And the same holds when the offence is *facti transeuntis*. Thus, on an indictment for libel, proof may first be given of the libel, and the defendant may then be shewn to have been the publisher of it. Another illustration is afforded by prosecutions for conspiracy, where it is a settled rule that general evidence may be given to prove the existence of a conspiracy, before the accused is shewn to be connected with it (*n*); for here the corpus delicti is the conspiracy, and the participation of the accused is an independent matter which may or may not exist. The rule that the acts and declarations of conspirators are evidence against their fellows, rests partly on this principle, and partly on the law of principal and agent. The following summary of the practice, taken from an approved work (*o*), is fully supported by authority. "Where several persons are proved to have combined together for the same illegal purpose, any act done by one of the party, in pursuance of the original concerted plan, and with reference to the common object, is in contemplation of law the act of the whole party; and, therefore, the proof of such act would be evidence against any of the others who were engaged in the same conspiracy; and, further, any declarations, made by one of the party at the time of doing such illegal act, seem not only to be evidence against himself, as tending to determine the quality of the act, but to be evidence also against the rest of the party, who are as much responsible as if they had themselves done the act. But what one of the party may have been heard to say at some other time, as to the share which some of the others had in the execution of the common design, or as to the object of the conspiracy, cannot, it is conceived, be ad-

(*n*) See the authorities collected in Rosc. Crim. Ev. 389, 5th Ed.; also *R.* v. *Blake*, 6 Q. B. 126; *R.* v. *Esdaile*, 1 Fost. & F. 213.

(*o*) 3 Gr. Russ. 161, 4th Ed. See also Phill. & Am. Ev. 210, 434; Tayl. Ev. §§ 527—532, 4th Ed.

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mitted as evidence to affect them on their trial, for the same offence. And, in general, proof of concert and connection must be given, before evidence is admissible of the acts or declarations of any person not in the presence of the prisoner. It is for the court to judge whether such connection has been sufficiently established; but when that has been done, the doctrine applies that each party is an agent for the others, and that an act done by one in furtherance of the unlawful design, is in law the act of all, and that a declaration made by one of the parties, at the time of doing such an act, is evidence against the others." And this is in accordance with the law in other cases; for if several persons go out with the common design of committing an unlawful act, anything done by one of them in prosecution of that design, though not in presence of his fellows, is in law the act of them all (*p*).

Instances illustrative of the rule "res inter alios acta &c."

§ 509. The rule "res inter alios acta alteri nocere non debet," is so elementary in its nature that a few instances will suffice for its illustration (*q*). Sir Edward Coke gives the following:—"If a man make a lease for life, and then grant the reversion for life, and the lessee attorn, and after the lessor disseise the lessee for life, and make a feoffment in fee, and the lessee reenter, this shall leave a reversion in the grantee for life, and another reversion in the feoffee, and yet this is no attornment in law of the grantee for life, because he doth no act, nor assent to any which might amount to an attornment in law. Et res inter alios acta &c." (*r*) Where several persons are accused or suspected of a criminal offence (*s*), or sued in a civil court (*t*), a con-

(*p*) 1 Hale, P. C. 462 *et seq.*; Fost. C. L. 349–350, 353–354; *R.* v. *Hodgson*, 1 Leach, C. L. 6; 4 Black. Com. 34.

(*q*) The reader desirous of more will find a large number collected in Wingate's Maxims, p. 327.

(*r*) Co. Litt. 319 a.

(*s*) Kely. 18; 9 Ho. St. Tr. 23.

(*t*) Godb. 326, pl. 418; *Hemmings* v. *Robinson*, 1 Barnes' Notes, 317.

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fession or admission by one in the absence of his fellows is no evidence against them. So where, on an appeal of robbery against A., the jury acquitted the defendant, and found that B. and C. abetted the appellant to bring the false appeal: as B. and C. were strangers to the original, they were not concluded by this finding; "but," adds the report, "they shall be distrained ad respondendum" (*u*),—a good instance of the value of res inter alios acta as *indicative*, however dangerous it would be as *legal*, evidence.

Indicative evidence.

Exceptions to the rule.

§ 510. We have said that there are exceptions to this rule. Thus, although in general strangers are not bound by, and cannot take advantage of estoppels, yet it is otherwise when the estoppel runs to the disability or legitimation of the person (*x*). So a judgment *in rem*, in the Exchequer, is conclusive against all the world (*y*): as also was a fine after the period of non-claim had elapsed (*z*). The admissibility in evidence, of many documents of a public and quasi public nature is at variance with this principle, which is then brought in collision with the maxim "omnia præsumuntur ritè esse acta:" and the number of them has been much increased by statute, especially in late years (*a*). The following decided exception is also given by Littleton (*b*):—"If there be lord mesne and tenant, and the tenant holdeth of the mesne by the service of five shillings, and the mesne holdeth over by the service of twelve pence, if the lord paramont purchase the tenancy in fee, then the service of the mesnalty is extinct; because that when the lord paramont hath the tenancy, he holdeth of his lord next paramont to him, and if he should hold this of him which was mesne, then he

(*u*) Old record of Mich. 42 Edw. III. set out 12 Co. 125, 126.
(*x*) *Infrà*, ch. 7, sect. 2.
(*y*) *Infrà*, ch. 9.
(*z*) 2 Blackst. Comm. 354.
(*a*) See bk. 1, pt. 2.
(*b*) Sect. 231.

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should hold the same tenancy immediately of divers lords by divers services, which should be inconvenient, and the law will sooner suffer a mischief than an inconvenience, and therefore the seignory of the mesnalty is extinct." On this Sir Edward Coke observes (*c*),—"It is holden for an inconvenience, that any of the maxims of the law should be broken, though a private man suffer loss; for that by infringing of a maxim, not only a general prejudice to many, but in the end a public incertainty and confusion to all would follow. And the rule of law is regularly true, *res inter alios acta alteri nocere non debet, et factum unius alteri nocere non debet;* which are true with this exception, unless an inconvenience should follow." And another old book lays down as maxims, "Privatum incommodum publico bono pensatur" (*d*)—"Privatum commodum publico cedit" (*e*).

(*c*) Co. Litt. 152 b.
(*d*) Jenk. Cent. 2, Cas. 65.
(*e*) Jenk. Cent. 5, Cas. 80.

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Chapter VI.

OPINION EVIDENCE.

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General rule—Opinion evidence not receivable.

§ 511. The use of witnesses being to inform the tribunal respecting *facts*, their *opinions* are not in general receivable as evidence (*a*). This rule is necessary to prevent the other rules of evidence being practically nullified. Vain would it be for the law to constitute the jury the triers of disputed facts, to reject derivative evidence when original proof is withheld, and to declare that a party is not to be prejudiced by the words or acts of others with whom he is unconnected, if tribunals might be swayed by opinions relative to those facts, expressed by persons who come before them in the character of witnesses. If the opinions thus offered are founded on no evidence, or on illegal evidence, they ought not to be listened to; if founded on legal evidence, that evidence ought to be laid before the jury,

(*a*) Peake, Evid. 195, 5th Ed.; Ph. & Am. Evid. 899; 1 Phill. Evid. 520, 10th Ed.; 1 Greenl. Evid. § 440, 7th Ed.; 3 Burr. 1918; 5 B. & Ad. 846, 847; and the authorities in the following notes.

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whom the law presumes to be at least as capable as the witnesses, of drawing from them any inferences that justice may require. "Testes rationem scientiæ reddere teneantur"(*b*). "Les testm̃ doivent rien tesm̃ fors ceo que ils soient de certein, s. ceo que ils veront ou oyront"(*c*). "Omne sacramentum debet esse certæ scientiæ" (*d*). "It is no satisfaction for a witness to say that *he thinks*, or *persuadeth himself*, and this for two reasons. First. Because the judge is to give an absolute sentence, and for this ought to have a more sure ground than thinking. Secondly. The witness cannot be sued for perjury" (*e*).

§ 512. This rule must not, however, be misunderstood;—nothing being farther from the design of the law, than to exclude from the cognizance of the jury, anything which could legitimately assist them in forming a judgment on the facts in dispute;—its meaning is simply, that questions shall not be put to a witness which virtually put him in the place of the jury, by substituting his judgment for theirs. A good illustration of its real nature is afforded by the case of *Daines and another* v. *Hartley* (*f*). That was an action for slandering the plaintiffs in their trade. At the trial a witness deposed to the following words, as having been spoken by the defendant relative to some bills given by the plaintiffs to a firm of which the witness was member, "You must look out sharp that those bills are met by them." The counsel for the plaintiffs then proposed to ask "What did you understand by that?" which question was objected to, and disallowed by the judge. A rule for a new trial was afterwards obtained, on the ground that the question was improperly rejected: which, after ar- Meaning of the rule.

(*b*) Heinec. ad Pand. pars 4, § 144.
(*c*) Per Thorpe, C. J., 23 Ass. pl. 11.
(*d*) 4 Inst. 279.
(*e*) Dyer, 53 b, pl. 11, in marg. Ed. 1688.
(*f*) 3 Exch. 200.

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gument, was discharged: and the following judgment was delivered by Pollock, C. B., in the name of the court: "There can be no doubt that words may be explained by bystanders to import something very different from their obvious meaning. The bystanders may perceive that what is uttered is uttered in an ironical sense, and therefore, that it may mean directly the reverse of what it professes to mean. Something may have previously passed, which gives a peculiar character and meaning to some expression; and some word which ordinarily or popularly is used in one sense, may, from something that has gone before, be restricted and confined to a particular sense, or may mean something different from that which it ordinarily and usually does mean. But the proper course for a counsel who proposes so to get rid of the plain and obvious meaning of words imputed to a defendant, as spoken of the plaintiff, is to ask the witness, not 'What did you understand by those words?' but 'Was there anything to prevent those words from conveying the meaning which ordinarily they would convey?' because, if there was, evidence of that may be given; and then the question may be put. When you have laid the foundation for it, the question then may be put, 'What did you understand by them?' when it appears that something occurred by which the witness understood the words in a sense different from their ordinary meaning. I believe we may say, that generally no question ought to be put in such a form as possibly to lead to an illegal answer. Now, taken by itself, and without more, the understanding of a person who hears an expression is not the legal mode by which it is to be explained. If words are uttered or printed, the ordinary sense of those words is to be taken to be the meaning of the speaker; but no doubt a foundation may be laid, by shewing something else which has occurred; some other matter may be introduced, and then, when that has been done, the witness may be asked,

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with reference to that other matter, what was the sense in which he understood the words. But the mere question, 'What did you understand with reference to such an expression?' we think is not the correct mode of putting the question."

Exceptions to the rule.

§ 513. The rule is not without its exceptions. Being based on the presumption that the tribunal is as capable of forming a judgment on the facts as the witness, when circumstances rebut this presumption the rule naturally gives way—"Cessante ratione legis cessat ipsa lex"(*g*).

1. Evidence of "experts" on questions of science, skill, trade, &c.

1. On questions of science, skill, trade, and the like, persons conversant with the subject-matter—called by foreign jurists "experts," an expression now naturalized among us,—are permitted to give their opinions in evidence. This rests on the maxim "cuilibet in suâ arte perito est credendum"(*h*), and the principle seems correctly stated by John W. Smith(*i*), that "the opinion of witnesses possessing peculiar skill is admissible, whenever the subject-matter of inquiry is such, that inexperienced persons are unlikely to prove capable of forming a correct judgment upon it without such assistance, in other words, when it so far partakes of the nature of a science as to require a course of previous habit, or study, in order to the attainment of a knowledge of it." A large number of instances of the application of this principle are to be found in the books. The opinions of medical men are constantly admitted as to the cause of disease or of death; or the consequence of wounds; or with respect to the sane or insane state of a person's mind, as collected from a number of circumstances; and on other subjects of professional skill(*k*). But where

(*g*) Co. Litt. 70 b.

(*h*) Co. Litt. 125 a; 4 Co. 29 a; *Calvin's case*, 7 Co. 19 a.

(*i*) 1 Smith's Lead. Cas. 491, 5th Ed.

(*k*) 1 Greenl. Ev. § 440, 7th Ed. The practice of resorting to this species of scientific evidence is by no means a modern invention. In the 28 Ass. pl. 5, on an

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scientific men are called as witnesses, they cannot give their opinions as to the general merits of the cause, but only their opinions upon the facts proved (*l*). Seal engravers may be called to give their opinion upon an impression, whether it was made from an original seal or from an impression; the opinion of an artist is evidence in an inquiry as to the genuineness of a picture; a ship-builder may give his opinion as to the seaworthiness of a ship; and where the question was, whether a bank which had been erected to prevent the overflowing of the sea had caused the choking up of a harbour, the opinions of scientific engineers as to the effect of such an embankment upon the harbour were held admissible evidence (*m*). To these it may be added, that the opinions of antiquaries have been received relative to the date of ancient hand-writing (*n*); and where, on an indictment for uttering a forged instrument, the question was whether a paper had originally contained certain pencil marks, which were alleged to have been rubbed out and writing substituted in their stead; the opinion of an engraver, who was in the habit of looking at minute lines on paper, and had examined the document with a mirror, was held receivable, although of no weight unless confirmed (*o*). It is on this principle that the evidence of professional or official persons is receivable as proof of foreign laws (*p*). From the very nature of the

appeal of maihem, the defendant prayed that the court would see the wound to see if there had been a maiming or not. And the court did not know how to adjudge because the wound was new, and then the defendant took issue, and prayed the court that the maihem might be examined; on which a writ was sent to the sheriff to cause to come "Medicos, chirurgicos de melioribus London. ad informandum dominum regem et curiam de his, quæ eis ex parte domini regis injungerentur." See also Plowd. 125.

(*l*) 1 Greenl. Ev. § 440, 7th Ed.; *M'Naghten's case*, 10 Cl. & F. 200.

(*m*) 1 Greenl. Ev. § 440, 7th Ed.

(*n*) *Tracy Peerage case*, 10 Cl. & F. 154.

(*o*) *R.* v. *Williams*, 8 C. & P. 434.

(*p*) Tayl. Ev. § 1280, 4th Ed.; *The Sussex Peerage case*, 11 Cl.

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subject, experts can only speak to their judgment or belief.

§ 514. But the weight due to this, as well as to every other kind of evidence, is to be determined by the tribunal; which should form its own judgment on the matters before it, and is not concluded by that of any witness, however highly qualified or respectable. Nor is this always an easy task; there being no evidence the value of which varies so immensely as that now under consideration, and respecting which it is so difficult to lay down any rules beforehand. Its most legitimate, valuable, and wonderful application is on charges of poisoning, where poison is extracted from a corpse by means of chemical analysis (*q*). "It is surely," says Dr. Beck (*r*), "no mean effort of human skill to be brought to a dead body, disinterred perhaps after it has lain for months, or even years in the grave; to examine its morbid condition; to analyze the fluids contained in it (often in the smallest possible quantities); and from a course of deductions founded in the strictest logic, to pronounce an opinion, which combined circumstances, or the confession of the criminal, prove to be correct." "It is such duties ably performed, that raise our profession to an exalted rank in the eyes of the world; that cause the vulgar, who are ever ready to exclaim against the inutility of medicine, to marvel at the mysterious power by which an atom of arsenic, mingled amidst a mass of confused ingesta, can still be detected. It does more: it impresses on the minds of assassins, who resort to poison, a salutary dread of the great impossibility of escaping discovery." "And this, if properly done, must

& F. 85; *Earl Nelson* v. *Lord Bridport*, 8 Beav. 527; *The Baron de Bode's case*, 8 Q. B. 208; *Bristow* v. *Sequeville*, 5 Exch. 275; *Vander Donckt* v. *Thellusson*, 8 C. B. 812; *Perth Peerage case*, 2 Ho. Lo. Cas. 874.

(*q*) *Suprà*, ch. 2, sect. 3, subsect. 2.

(*r*) Beck's Med. Jur. 1085, 7th Ed.

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be accomplished without listening to rumour and without permitting prejudice to operate. Many, again, by their researches, have saved the innocent, showing that accidental or natural causes have produced all the phenomena." It would not be easy to overrate the value of the evidence given in many difficult and delicate inquiries, not only by medical men and physiologists, but by learned and experienced persons in various branches of science, art, and trade. But as it is impossible to measure à priori the integrity of any witness, and equally so to determine the amount of skill which a person following a particular science, art, or trade may possess, the tribunal is under the necessity of listening to all such persons when they present themselves as witnesses. Now; after making every allowance for the natural bias which witnesses usually feel in favour of causes in which they are engaged, and giving a wide latitude for bonâ fide opinions, however unfounded or fantastical, which persons may form on subjects necessarily depending much on conjecture; there can be no doubt that testimony is daily received in our courts as "scientific evidence," to which it is almost profanation to apply the term; as being revolting to common sense, and inconsistent with the commonest honesty on the part of those by whom it is given. In truth, witnesses of this description are apt to presume largely on the ignorance of their hearers with respect to the subject of examination, and little dread prosecution for perjury—an offence of which it is extremely difficult, indeed almost impossible, to convict a person who only swears to his belief, particularly when that belief relates to scientific matters (*s*). On the other hand, however,

(*s*) Bonnier, in his Traité des Preuves, after quoting the 64th Novel, which abundantly shews that these malpractices were well understood in ancient Rome, sarcastically adds, "On voit que les complaisances de l'expertise ne datent pas de nos jours." § 68. He likewise forcibly observes, § 67, "L'expertise n'est qu'nn verre qui grossit les objets; et c'est au juge, qui a la faculté de

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mistakes have occasionally arisen from not attaching sufficient weight to scientific testimony. This arises chiefly where the knowledge of the tribunal and society in general, are very much in arrear of the scientific knowledge of the witness. One remarkable instance is cited by a modern author on the law of evidence. In the infancy of travelling by steam on land, a civil engineer of high reputation having deposed before a Parliamentary committee, that steam-carriages might very possibly be expected to travel on railroads at the rate of *ten* miles an hour, the interrogating counsel contemptuously bid him stand down, for he should ask him no more questions, and the weight of the evidence he had previously given was much impaired (*t*).

Experts in French law.

§ 515. In France experts are officially delegated by the court to inquire into facts and report upon them, and they stand on a much higher footing than either ordinary or scientific witnesses among us. Yet even there it is a maxim "Dictum expertorum nunquam transit in rem judicatam" (*u*). Our own law, in its desire to vindicate the unquestionably sound principle, that judicial and inquisitorial functions ought to be kept distinct, appears to have scarcely armed its courts with sufficient powers to compel the production of evidence—the instances in which they proceed *ex officio* to obtain it are few; and this case of experts seems one in which such a power might be vested in them with advantage, concurrently of course with the right of litigant parties to produce skilled witnesses of their own. Great steps in this direction have been taken by the legislature in the 22 & 23 Vict. c. 63, and 24 Vict. c. 11: by the

22 & 23 Vict. c. 63.

24 Vict. c. 11.

s'en servir, à examiner en toute liberté si les images qu'elle lui présente sont bien nettes."

(*t*) Gresley, Ev. in Eq. 369. Stephenson's evidence, before the committee on the Liverpool and Manchester Railway Bill, was received with equal incredulity. See Smiles' Life of Stephenson, *in loc.*

(*u*) Bonnier, Traité des Preuves, § 74.

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former of which courts of justice in one part of the Queen's dominions are empowered, in certain proceedings, to remit a case for the opinion of a court of justice in any other part thereof, on any point on which the law of that other part is different from that in which the court is situate; and the latter empowers them to remit a case with queries to the tribunals of foreign countries for ascertaining the law of those countries.

Scientific evidence received with too little discrimination.

§ 516. So far as medical evidence is concerned, medical jurists complain that there is too little discrimination exercised in receiving all who are called *doctors* as witnesses. "In England," says an able authority already quoted (*x*), "not only physicians, surgeons, and apothecaries, beyond whom it should not be extended, but hospital dressers, students, and quacks, have been permitted to act as medical witnesses. 'We could point out a case of poisoning,' say the editors of the Edinburgh Medical and Surgical Journal, 'where the most essential part of the evidence depended on the testimony of a quack alone, and it was admitted.'" But, to answer these authors in their own language, the remedy they prescribe is worse than the disease. Must the judge, before receiving the testimony of a man who makes profession of the healing art, institute a preliminary inquiry as to whether he comes within the definition of a "quack?"—one of the most uncertain words in the language, and the correctness of the application of which to particular individuals must ever, to a certain extent, be matter of opinion. Besides it would be at variance with the free spirit of our laws, to place the lives and liberties of all persons accused of offences in the hands of a privileged class, by prohibiting them from availing themselves of the

(*x*) Beck's Med. Jurisp. 1091, 7th Ed.

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testimony of others who have studied and practised the subject in question. Still it must be conceded that our practice is much too loose in this respect—that when medical, or other scientific, witnesses are offered, our judges and jurymen do not inquire sufficiently into the causa scientiæ,—the means which they have had of forming a judgment. To say nothing of those palpable cases where the course of study has been so short, or the experience so limited, that the judge ought to reject the witness altogether; or of those where, though the evidence must be received, it is clear that little confidence ought to be reposed in the opinion given; it often happens that even men distinguished in one branch of a science or profession have but a superficial knowledge of its other branches. The most able physician or surgeon may know comparatively little of the mode of detecting poisons, or of other intricate branches of medical jurisprudence; so that a chemist or physiologist, immeasurably his inferior in every other respect, might prove a much more valuable witness in a case where that sort of knowledge is required (*y*).

2. Opinions founded on complex facts which cannot easily be brought before the tribunal.

§ 517. 2. Another class of exceptions is to be found, where the judgment or opinion of a witness, on some question material to be considered by the tribunal, is formed on complex facts which from their nature it would be impossible to bring before it. Thus, the identification by a witness of a person or thing is necessarily an exercise of his judgment. "In the identification of person," says Parke, B. (*z*), "you compare in

(*y*) The celebrated John Hunter, the great anatomist, who was examined as a witness in the important case of *Donellan*, indicted for having poisoned his brother-in-law, used to express his regret publicly in his lectures, that he had not given more attention to the subject of poisons, before venturing to give an opinion in a court of justice. Sir Astley Cooper, as quoted in Beck's Med. Jur. 1089, 7th Ed.

(*z*) *Fryer* v. *Gathercole*, 13 Jur. 542.

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your mind the man you have seen with the man you see at the trial. The same rule belongs to every species of identification." And on the same occasion Alderson, B., said, "Generally, wherever there is such a coincidence in admitted facts, as makes it more reasonable to conclude that a certain subject-matter is one thing rather than another, that coincidence may be laid before the jury to guide their judgment in deciding on the probability of that fact." Many mistakes, however, have been made in the identification both of persons and of things (*a*). So, the state of an unproducible portion of real evidence,—as, for instance, the appearance of a building, or of a public document which the law will not allow to be brought from its repository,—may be explained by a term expressing a complex idea; e. g., that it looked old, decayed, or fresh, was in good or bad condition (*b*), &c. So also may the emotions or

(*a*) The resemblance between individuals is often very close. A well-known man of fashion once narrowly escaped conviction for a highway robbery, from his extraordinary resemblance to a notorious highwayman of the day, (Beck's Med. Jur. 408, 7th Ed.); and Sir Thomas Davenport, an eminent barrister, swore positively to the persons of two men, whom he charged with robbing him and his lady in the open daylight. A clear alibi was however proved, and the real robbers being afterwards taken into custody with the stolen property upon them, Sir Thomas, on seeing them, at once acknowledged that he had been mistaken (per MacNally, arguendo, in *R.* v. *Byrne*, 28 Ho. St. Tr. 819). For other cases of mistaken identity of *persons*, see Wills, Circ. Evid. 90 *et seq.* 3rd Ed.; Beck's Med. Jurisp. 404 *et seq.* 7th Ed.; the case of *James Crow*, Theor. of Pres. Proof, Append. Case 4, and that of *Male*, 3 Benth. Jud. Ev. 255, and Dicks. Law Ev. in Scotl. 153, note (*d*), and 154, note (*a*). In *Shufflebottom* v. *Allday*, Exch. M. 1856, M.S., Alderson, B., mentioned a case which occurred at Liverpool some years before, where a prisoner was identified by six or seven respectable witnesses; but their evidence was encountered by that of the jailor and all the officers of the prison, who deposed that at the time in question he was there in their custody. A good instance of mistaken identity of *things*, taken from Burnett's Crim. Law of Scotland, p. 558, will be found in 19 Ho. St. Tr. 494 (note).

(*b*) *Leighton* v. *Leighton*, 1 Str. 240.

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feelings of a party whose psychological condition is in question—thus a witness may state as to whether on a certain occasion he looked pleased, excited, confused, agitated, frightened, or the like (*c*). To this head also belong the proof of handwriting ex visu scriptionis and ex scriptis olim visis (*d*). And it is on this principle that testimony to character is received; as where a witness deposes to the good or bad character of a party who is being tried on a criminal charge, or states his conviction that from the general character of another witness he ought not to be believed on his oath (*e*). In all cases, of course, the grounds on which the judgment of the witness is formed may be inquired into on cross-examination.

(*c*) *Suprà*, ch. 2, sect. 3, subsect. 3.

(*d*) Bk. 2, pt. 3, ch. 2.

(*e*) *Suprà*, pt. 1, ch. 1.

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CHAPTER VII.

SELF-REGARDING EVIDENCE.

SECTION I.

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Self-regarding evidence.

§ 518. In the preceding chapters we have shewn the general nature of those rules, by which evidence is rejected for want either of originality or of proximity. The present will be devoted to that species of evidence for or against a party, which is afforded by the language or demeanour of himself, or of those whom he represents, or of those who represent him. All such we purpose to designate by the expression "Self-regarding evidence." When in favour of the party supplying it, the evidence may be said to be "Self-serving;" when otherwise, "Self-disserving" (*a*).

General rule.

§ 519. The rule of law with respect to self-regarding evidence is, that when in the self-*serving* form it is not in general receivable; but that in the self-*disserving* form it is, with few exceptions, receivable, and is usually considered proof of a very satisfactory kind (*b*). For, although, when viewed independently of jurisprudence, it would be difficult to maintain that the declarations, or what is equivalent to the declarations of one man, may not in particular cases have some probative force as evidence against another, our law rejects them (*c*); in obedience to its great principle which requires judicial evidence to be proximate, and also from the peculiar temptations to fraud and fabrication which the allowing such evidence would so obviously supply. This is a branch of the general rule that a man shall not be allowed to make evidence for himself (*d*). But, on the other hand, the universal experience of mankind testifies that, as men consult their own interest, and seek their own advantage; whatever they say or admit against their

(*a*) These three terms are taken from Benth. Jud. Ev. vol. 5, p. 204. The term "Self-regarding" and its two species are also applicable to the statements and demeanour of *witnesses*.

(*b*) Gilb. Evid. 119, 4th Ed.; Finch, Law, 37; Trials per Pais, 381. See acc. Mascard. de Prob. Quæst. 7, N. 10.

(*c*) 2 Campb. 389, and *suprà*, bk. 1, pt. 1, § 91.

(*d*) 3 B. & A. 144. See *suprà*, ch. 5, § 506.

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interest or advantage may, with tolerable safety, be taken to be true as against them, at least until the contrary appears.

Self-*serving* evidence.

§ 520. The subject of self-*serving* evidence may therefore be despatched in few words, and indeed has been substantially considered under the title "res inter alios acta alteri nocere non debet" (*e*). There are, however, some exceptions to the rule excluding it. The first is, that where part of a document or statement is used as self-disserving evidence against a party, he has a right to have the whole of it laid before the jury, who may then consider, and attach what weight they see fit to any self-serving statements it contains (*f*). This exception is founded on the plain principle of justice that, by using a man's statement against him you adopt that statement, as *evidence* at least. The civilians seem to have gone farther. "Observe," says Pothier (*g*), "that when I have no other proof than your confession, I cannot divide it. Suppose, for instance, that I claim from you 200 livres, which I allege that you have borrowed, and of which I demand the payment; you admit the loan, but add, that you have repaid it; I cannot found a proof of the loan upon your confession, which is, at the same time, a proof of payment; for I can only use it against you such as it is, and taking it altogether, Si quis confessionem adversam allegat, vel depositionem testis, dictam cum suâ quantitate approbare tenetur." This was probably just enough under their judicial system; but with us, while the whole statement must be received, the credit due to each part must be determined by the jury, who may believe the self-serving

(*e*) *Suprà*, ch. 5.

(*f*) Tayl. Ev. § 655, 4th Ed.; Peake, Ev. 16, 5th Ed.; 2 Ev. Poth. 156—158; *Randle* v. *Blackburn*, 5 Taunt. 245; *Thomson* v. *Austen*, 2 D. & Ryl. 358; *Smith* v. *Blandy*, Ry. & M. 257; *Darby* v. *Ouseley*, 2 Jur., N. S. 497.

(*g*) 1 Ev. Poth. § 799.

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and disbelieve the self-disserving portion of it, or vice versâ. Again, a person on his trial may, at least if not defended by counsel, state matters in his defence which are not already in evidence, and which he is not in a condition to prove, and the jury may act on that statement if they deem it worthy of credit (*h*). Care must likewise be taken not to confound self-serving evidence with res gestæ. The language of a party accompanying an act which is evidence in itself, may form part of the res gestæ, and be receivable as such.

Self-*disserving* evidence.

§ 521. We return therefore to the more important and difficult subject of self-*disserving* evidence. This may be supplied by *words*, *writing*, *signs*, or *silence*.

How supplied.

"Non refert an quis intentionem suam declaret verbis, an rebus ipsis, vel factis" (*i*).

Words.

Words addressed to others, and writing, are no doubt the most usual forms; but words uttered in soliloquy seem equally receivable (*k*); while of signs it has justly been said, "Acta exteriora indicant interiora secreta" (*l*).

Writing.

Signs.

Thus, a deaf and dumb person may be called on to plead, or advocate his cause, through the medium of an interpreter who can explain his signs to the court and jury (*m*).

Silence.

So of silence, "qui tacet, consentire videtur" (*n*),—a maxim which must be taken with considerable limitation. A far more correct exposition of the principle contained in it is the following: "Qui tacet, non utique fatetur: sed tamen verum est, eum non negare" (*o*): and one of our old authorities tells us

(*h*) See bk. 4, pt. 1.

(*i*) 10 Co. 144 a. See *Ford* v. *Elliott*, 4 Exch. 78.

(*k*) *R.* v. *Simons*, 6 C. & P. 540.

(*l*) 8 Co. 146 b; Wing. Max. 108; Broom's Max. 296, 4th Ed.

(*m*) *R.* v. *Jones*, 1 Leach, C. L. 102; *R.* v. *Steel*, *Id.* 451.

(*n*) 12 Hen. VIII. 8; Hob. 102; Jenk. Cent. 1, Cas. 64; Cent. 2, Cas. 30; Cent. 5, Cas. 87; Sext. Decretal. lib. 5, tit. 12, de reg. juris, Reg. 43.

(*o*) Dig. lib. 50, tit. 17, l. 142. See also Sext. Decretal. lib. 5, tit. 12, de regulis juris, Reg. 44.

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with truth, "Le nient dedire n'est cy fort come le confession est" (*p*), which seems fully recognized in modern times (*q*). The maxim is also found guarded in this way, "Qui tacet consentire videtur, ubi tractatur de ejus commodo" (*r*). The principal application of this maxim is in criminal cases, where a person charged with having committed an offence makes no reply; the force and effect of which will be more fully considered in another place (*s*).

1. "Judicial" and "extra-judicial."

§ 522. As to the different kinds of self-disserving statements. In the first place they are either "Judicial" or "Extra-judicial,"—*in judicio* or *extra judicium* (*t*): according as they are made in the course of a judicial proceeding, or under any other circumstances.

2. Admissions and Confessions.

§ 523. 2. Self-disserving statements in civil cases are usually called "Admissions," and those in criminal cases "Confessions." The latter term is however sometimes used in civil pleadings, as when we speak of pleas in confession and avoidance. The civilians and canonists express all kinds under the term "confessio."

3. "Plenary" and "Not plenary."

§ 524. 3. Self-disserving statements are divisible into "Plenary" and "Not plenary." A "Plenary" confession is when a self-disserving statement is such as, if believed, is conclusive against the person making it, at least on the physical facts of the matter to which it relates: as where a party accused of murder says, "I murdered," or "I killed," the deceased. In such cases the proof is in the nature of *direct* evidence, and

(*p*) Long. Quint. 125, 126.

(*q*) *Hayslep* v. *Gymer*, 1 A. & E. 162. See *Morgan* v. *Evans*, 3 Cl. & F. 205; *Gaskill* v. *Skene*, 14 Q. B. 664, and *Boyle* v. *Wiseman*, 10 Exch. 651.

(*r*) 20 Hen. VI. 13 b.

(*s*) See *infrà*, sect. 3, sub-sect. 3.

(*t*) 1 Greenl. Ev. § 216, 7th Ed.; 1 Ev. Poth. §§ 797, 801.

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the maxim is "habemus optimum testem, confitentem reum" (*u*). A confession "not plenary" is, where the truth of the self-disserving statement is not absolutely inconsistent with the existence of a state of facts different from that which it indicates, but only gives rise to a presumptive inference of their truth; and is therefore in the nature of *circumstantial* evidence (*v*). E. g. A. is found murdered, or the goods of B. are proved to have been stolen, and the accused or suspected person says, "I am very sorry that I ever had anything to do with A.," or "that I ever meddled with the goods of B." These expressions are obviously ambiguous; for, although consistent with an intention to avow guilt, they are equally so with an expression of regret, that circumstances should have occurred to cast unjust suspicion on the speaker. So where a person accused of an offence admits that he intended, or even threatened to commit it, or that he fled to avoid being tried for it (*x*).

Admissible as *primary* evidence of written documents.

§ 525. Although, as already stated, self-disserving evidence is in general admissible against the party supplying it, it has been made a great question whether this extends to the proof of the contents of written instruments or documents—whether the principle that such are the best or primary evidence of their own contents, does not override the principle under consideration. Elementary as this point may seem, it has only been settled of late years, if indeed it can be deemed fully settled even now; and there is probably not one question to be found in the whole law of England, which has caused greater difference of opinion. After a long series of irreconcilable dicta and rulings at Nisi Prius (*y*), the

(*u*) Ph. & Am. Ev. 419; 2 Hagg. Cons. Rep. 315.

(*v*) 3 Benth. Jud. Ev. 108.

(*x*) See *suprà*, ch. 2, sect. 3, sub-sect. 3.

(*y*) These will be found collected in an article by the author in the Monthly Law Mag. vol. 5, p. 175.

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subject came before the Court of Exchequer in Michaelmas Term, 1840, in the case of *Slatterie* v. *Pooley* (*z*). There the question was, whether a debt for which an action had been brought by one J. T. against the plaintiff, was included in the schedule to a certain composition deed. The schedule being inadmissible as evidence for want of a proper stamp, a verbal admission by the defendant, that the debt in question was the same with that entered in the schedule, was rejected by Gurney, B., at Nisi Prius; on the ground that the contents of a written instrument, which is itself inadmissible for want of a proper stamp, cannot be proved by parol evidence of any kind. The plaintiff having been nonsuited, a rule was obtained for a new trial, against which cause was shewn, and several of the previous cases cited. The court, however,—consisting of Parke, Alderson, Gurney and Rolfe, BB.,—having taken time to consider, unanimously made the rule absolute, without hearing counsel in support of it. Parke, B., in delivering his judgment, says, p. 668, "We who heard the argument (my brother Alderson, who is absent, as well as ourselves) entertain no doubt that the defendant's own declarations were admissible in evidence, to prove the identity of the debt sued for with that mentioned in the schedule, although such admissions involved the contents of a written instrument not produced; and I believe my Lord Abinger, who was not present at the argument, entirely concurs. The authority of Lord Tenterden at Nisi Prius, in the case of *Bloxam* v. *Elsee* (*a*), is no doubt to the contrary: but since that case as well as before, there have been many reported decisions, that whatever a party says, or his acts amounting to admissions, are evidence against himself, though such admissions may involve what must necessarily be contained in some deed or writing; * * * and any one experienced in the conduct

(*z*) 6 M. & W. 664. (*a*) Ry. & M. 187; 1 C. & P. 558.

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of causes at Nisi Prius, must know how constant the practice is. Indeed, if such evidence were inadmissible, the difficulties thrown in the way of almost every trial would be nearly insuperable. The reason why such parol statements are admissible, without notice to produce, or accounting for the absence of the written instrument, is, that they are not open to the same objection which belongs to parol evidence from other sources, where the written evidence might have been produced; for such evidence is excluded, from the presumption of its untruth, arising from the very nature of the case, where better evidence is withheld; whereas what a party himself admits to be true, may reasonably be presumed to be so. The weight and value of such testimony is quite another question. That will vary according to the circumstances, and it may be in some cases quite unsatisfactory to a jury. But it is enough for the present purpose to say, that the evidence is admissible."

§ 526. The authority of *Slatterie* v. *Pooley*, at least so far as relates to extra-judicial statements, has been recognized and acted on in a great many cases (*b*); but has been severely attacked in Ireland (*c*), and has been questioned in this country (*d*). In *Lawless* v. *Queale* (*e*), Lord Chief Justice Pennefather, speaking of that case, says, "The doctrine there laid down is a most dangerous proposition; by it a man might be deprived of an estate

(*b*) *Howard* v. *Smith*, 3 Scott, N. R. 574; *Boulter* v. *Peplow*, 9 C. B. 493; *Pritchard* v. *Bagshawe*, 11 *Id.* 459; *King* v. *Cole*, 2 Exch. 628; *Boileau* v. *Rutlin*, 2 Exch. 665; *Ridley* v. *The Plymouth Grinding Company*, 2 Exch. 711; *Toll* v. *Lee*, 4 *Id.* 230; *Murray* v. *Gregory*, 5 Exch. 468; *R.* v. *The Inhabitants of Basingstoke*, 14 Q. B. 611; *R.* v. *Welch*, 2 Car. & K. 296; 1 Den. C. C. 199; *Ansell* v. *Baker*, 3 Car. & K. 145; &c.

(*c*) *Lawless* v. *Queale*, 8 Ir. Law Rep. 382.

(*d*) Tayl. Ev. §§ 382 *et seq.*, 4th Ed.; *Sanders* v. *Karnell*, 1 F. & F. 356.

(*e*) *Lawless* v. *Queale*, 8 Ir. Law Rep. 382. See the observations of Crampton, J., in that case; and also *Thunder* v. *Warren*, *Id.* 181.

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of 10,000*l.* per annum, derived from his ancestors by regular family deeds and conveyances, by producing a witness, or by one or two conspirators who might be got to swear they heard the defendant say he had conveyed away his interest therein by deed, or had mortgaged or otherwise encumbered it; and thus by the facility so given, the most open door would be given to fraud, and a man might be stripped of his estate through this invitation to fraud and dishonesty." Now we must protest in toto against trying the *admissibility* of evidence by such a test as this. The most respectable and innocent man in the community may be hanged for murder on the unsupported testimony of a pretended accomplice; or sent to penal servitude for rape on the unsupported oath of an avowed prostitute; but is this a reason for altering the law with reference to the admissibility of the evidence of accomplices or prostitutes, or do innocent men feel themselves in danger from it? The weight of the species of proof under consideration varies ad infinitum. Look at the different forms in which it may present itself—plenary confession in judicio; non plenary confession in judicio; plenary quasi judicial confession before a justice of the peace; non-plenary quasi judicial confession before a justice of the peace; plenary extra-judicial confession to several respectable witnesses; the like to one such witness; non-plenary extra-judicial confession to several respectable witnesses; the like to one such; plenary extra-judicial confession to several suspected witnesses; the like to one such; non-plenary extra-judicial confession to several suspected witnesses; the like to one such: and under the term "non-plenary" is included every possible degree of casual observation, or even sign, from which the existence of the principal fact may be collected. The shade between the probative force of any two of these degrees is so slight as to be almost imperceptible, and yet of all forms of evidence the highest of

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these is perhaps the most satisfactory, and the lowest the most dangerous. The *value* of self-disserving evidence, like that of every other sort of evidence, is for the jury; its *admissibility* is a question of law—the test of which is to see if the evidence tendered is in its nature original and proximate (*f*); and it will scarcely be contended that self-disserving statements of all kinds do not fulfil both those conditions. It may, indeed, be objected that they usually come in a parol or verbal shape, and that parol evidence is inferior to written, but that is a maxim which has been much misunderstood (*g*). The contents of a document could most unquestionably be proved, by a chain of circumstantial evidence composed of *acts*, every link in which might be established by parol or verbal testimony.

§ 527. But although a party might admit the contents of a document, he could not, before the 17 & 18 Vict. c. 125, by admitting the *execution* of a deed (except when such admission was made for the purpose of a cause in court) dispense with proof of it by the attesting witness. The rule "omnia præsumuntur ritè esse acta" was here reversed; the courts holding that, although a party admitted the execution of a deed, the attesting witnesses might be acquainted with circumstances relative to its execution which were unknown to him, and which might have the effect of invalidating it altogether (*h*). The decisions establishing this dogma were previous to *Slatterie* v. *Pooley*, and seem to have been a remnant of the old practice of trying deeds by the witnesses to them (*i*). And the rule was not affected by the alteration made in the law by 14 & 15 Vict. c. 99,

But not to prove the *execution* of a deed, except under the 17 & 18 Vict. c. 125, s. 26.

(*f*) See bk. 1, pt. 1, §§ 88, 89, 90.

(*g*) See bk. 2, pt. 3, § 223.

(*h*) *Call* v. *Dunning*, 4 East, 53; *Abbot* v. *Plumbe*, 1 Dougl. 216; *Johnson* v. *Mason*, 1 Esp. 89; *Cunliffe* v. *Sefton*, 2 East, 183; *Barnes* v. *Trompowsky*, 7 T. R. 265.

(*i*) See bk. 2, pt. 3, §§ 220—221.

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which rendered the parties to a suit competent witnesses (*k*). But now, by the 17 & 18 Vict. c. 125, s. 26, any instrument to the validity of which attestation is not requisite, "may be proved by admission or otherwise, as if there had been no attesting witness thereto."

To whom self-disserving statements, &c. may be made.

§ 528. So far as its admissibility in evidence is concerned, it is in general immaterial *to whom* a self-disserving statement is made (*l*). But if coming under the head of what the law recognizes as confidential communication, it will not be received in evidence (*m*); neither will it if embodied in a communication made "without prejudice," the object of such being to buy peace, and settle disputes by compromise instead of by legal proceedings (*n*). It has indeed been held that, in order to render an account stated binding on a party, the admission of liability must be made to the opposite party or his agent (*o*); but this only refers to the effect of the admission, not to its admissibility. A distinction was formerly sought to be drawn, where a confession was made by a prisoner in consequence of an inducement to confess, held out by a party who had no authority over him or the charge against him. Although such an inducement does not exclude confessions made to others (*p*), it was doubted whether it would not exclude confessions made to the person holding out the inducement: but this distinction has been overruled (*q*).

(*k*) *Whyman* v. *Garth*, 8 Exch. 803.

(*l*) The old French lawyers drew some nice distinctions as to the effect of statements made to the opposite party or to strangers. See 1 Ev. Poth. § 801.

(*m*) See *infrà*, ch. 8.

(*n*) *Cory* v. *Bretton*, 4 C. & P. 462; *Healey* v. *Thatcher*, 8 *Id.* 388; *Paddock* v. *Forrester*, 3 M. & Gr. 903.

(*o*) *Breckon* v. *Smith*, 1 A. & E. 488, per Littledale, J.; *Hughes* v. *Thorpe*, 5 M. & W. 667, per Parke, B.; *Bates* v. *Townley*, 2 Exch. 156, per Parke, B.

(*p*) *R.* v. *Dunn*, 4 C. & P. 543; *R.* v. *Spencer*, 7 *Id.* 776.

(*q*) *R.* v. *Taylor*, 8 C. & P. 733.

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State of mind of party making self-disserving statement, &c.

§ 529. Self-disserving statements, &c., made by a party when his mind is not in its natural state, ought, in general, to be received as evidence, and his state of mind should be taken into consideration by the jury as an infirmative circumstance (*r*). Thus a confession made by a prisoner when drunk has been received (*s*); and although contracts entered into by a party in a state of total intoxication are void, it is otherwise where the intoxication is only partial, and not sufficient to prevent his being aware of what he is doing (*t*). So, what a person has been heard to say while talking in his sleep, seems not to be legal evidence against him (*u*), however valuable it may be as indicative evidence (*v*); for here the suspension of the faculty of judgment may fairly be presumed complete (*w*). The acts of persons

Drunkenness.

Talking in sleep.

Unsoundness of mind.

(*r*) "Circa ejusmodi instrumenta firmanda vel destruenda multum habet operis oratio, si quæ sint voces per vinum, somnium, dementiam emissæ;" Quint. Inst. Orat. lib. 5, c. 7.

(*s*) *R.* v. *Spilsbury*, 7 C. & P. 187.

(*t*) *Gore* v. *Gibson*, 13 M. & W. 623; 9 Jur. 140 and the note there, p. 142. See also Mascard. de Prob. Concl. 580.

(*u*) This point arose in the case of *R.* v. *Elizabeth Sippets*, Kent Summ. Ass. 1839, where Tindal, C. J., was inclined to think the evidence not receivable. Ex relatione. See also per Alderson, B., in *Gore* v. *Gibson*, 13 M. & W. 623, 627; 9 Jur. 140, 142.

(*v*) Bk. 1, pt. 1, § 93.

(*w*) Such a phenomenon may often be of the utmost importance as *indicative* evidence.

"Multi de magnis per somnum rebu' loquuntur
Indicioque sui facti persæpe fuere."
LUCRETIUS, lib. 4, vv. 1012—13. See also lib. 5, v. 1157.

"There are a kind of men so loose of soul,
That in their sleeps will mutter their affairs.
* * * * * * * * *
* * * Nay, this was but his dream.
But this denoted a foregone conclusion.
'Tis a shrewd doubt, tho' it be but a dream."
OTHELLO, Act 3, Sc. 3.

The following excellent instance is taken from Mr. Arbuthnot's Reports of Criminal Cases in the Court of Foujdaree Udalut, of Madras, p. 61. Five prisoners—named respectively Dasan Nayakan, Nachan, Venkatachalam, Tandavarayan and Chokan—were tried

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of unsound mind also are not in general binding; but this is subject to some exceptions, which will be found collected in the case of *Molton* v. *Camroux* (*x*).

Self-disserving statements made under mistake. Of *fact.*

§ 530. A party is not in general prejudiced by self-disserving statements made under a mistake of *fact.* "Ignorantia facti excusat" (*y*). "Non videntur, qui errant, consentire" (*z*), and "Non fatetur qui errat" (*a*), said the civilians. So, money may be recovered back which was paid under a forgetfulness of facts which were once within the knowledge of the party paying (*b*). But it is very different when the confession is made under a mistake of *law.* Here the civilians say, "Non fatetur, qui errat, nisi jus ignoravit" (*c*). Neither is a party to be prejudiced by a *confessio juris* (*d*), although this must be understood with reference to a confession of law not involved with facts, for the confession of a matter com-

Of *law.*

in September, 1834, for the wilful murder of one Perumal Naik. The deceased having been found murdered and much mutilated, the head lying on an ant-hill away from the rest of the body, suspicion fell on one Venkatasami, with whom he was on bad terms. Venkatasami's answers when questioned on the subject not being satisfactory, he was kept under surveillance in the house of a neighbour, and in the course of the following night was heard to talk in his sleep, allowing the following expressions to escape him. "Dasan, catch hold of the hands. Nachan, cut off the head. Tandavarayan, Chokan, and Venkatachalam, catch hold of his leg —come, we may go home after we have deposited the head on the top of an ant-hill." These words having been next morning reported to the authorities, Venkatasami was taken into custody and taxed with the murder, which he at once confessed, criminating the prisoners, whose names had been mentioned by him in his sleep, and who, on being apprehended, likewise confessed their guilt. Venkatasami and Nachan died before trial, but the other four were convicted, chiefly on their own confession, and left for execution.

(*x*) 2 Exch. 487; affirmed on error, 4 *Id.* 17.

(*y*) Lofft, M. 553.

(*z*) Dig. lib. 50, tit. 17, l. 116.

(*a*) 1 Ev. Poth, § 800.

(*b*) *Kelly* v. *Solari*, 9 M. & W. 54, and the cases there referred to.

(*c*) Dig. lib. 42, tit. 2, l. 2; 1 Ev. Poth. § 800. See *suprà*, ch. 2, sect. 2, sub-sect. 1.

(*d*) 1 Greenl. Ev. § 96, 7th Ed.

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pounded of law and fact is receivable. Every prisoner or defendant who pleads guilty in a criminal case, admits by his plea both the acts with which he is charged and the applicability of the law to them. So, on an indictment for bigamy, the first marriage, even though solemnized in a foreign country, may be proved by the admission of the accused (*e*).

By whom self-disserving statements, &c. may be made.

§ 531. Self-disserving statements, &c., may in general be made either by a party himself, or by those under whom he claims, or by his attorney or agent lawfully authorized—an application of the maxims "Qui per alium facit, per seipsum facere videtur" (*f*); "Qui facit per alium facit per se" (*g*). This of course means, that the party against whom the admission or confession is offered in evidence is of capacity to make one. On this subject the civilians laid down, "Qui non potest donare non potest confiteri" (*h*). So there are some acts which cannot be done by attorney, and some persons who cannot appoint one,—as, for instance, infants. And the person appointed to act for another cannot delegate this authority to a third, it being a maxim of law, "Delegata potestas non potest delegari" (*i*), "Delegatus non potest delegare" (*k*).

(*e*) 1 East, P. C. 471; *R.* v. *Newton*, 2 Moo. & R. 503; *R.* v. *Simmonsto*, 1 Car. & K. 164. But see *R.* v. *Flaherty*, 2 *Id.* 782.

(*f*) Co. Litt. 258 a; 4 Inst. 109; 10 Co. 33 b; 2 Jur., N. S. 18. See also Sext. Decret. lib. 5, tit. 12, de reg. jur., Reg. 72.

(*g*) Lofft, M. 163; 9 Cl. & F. 850.

(*h*) 1 Ev. Poth. § 804.

(*i*) 7 C. B., N. S. 496, 498; 2 Inst. 597.

(*k*) Broom's Max. 807, 809, 4th Ed.; 3 M. & W. 319—20; 5 Bingh. N. C. 310; 8 C. B. 630.

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Section II.

ESTOPPELS.

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Estoppels.

§ 532. An important distinction runs through the whole subject of self-disserving evidence, namely, that while in general its value is to be weighed by a jury, the law has invested some forms of it with an absolute and conclusive effect. Such are technically termed "Estoppels,"—a doctrine, the exposition of which in all its branches belongs rather to substantive than to adjective law. Some notice of its nature, and the general principles by which it is governed, are however indispensable here; and estoppels in criminal cases will be more particularly considered in the next section (*l*).

Nature of.

§ 533. Much misconception and prejudice have arisen from the unlucky definition or description of estoppel given by Sir Edward Coke, namely, that it is where "a man's own act or acceptance stoppeth or closeth up his

(*l*) *Infrà*, sect. 3, sub-sect. 1.

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mouth to allege or plead the truth" (*m*). If this is looked on as a definition, it violates the rules of logic, by defining by the genus and *non*-essential difference or accident; and if as a description, which indeed Sir Edward Coke himself calls it, it is almost equally objectionable; for one would imagine from the above language, that *truth* was the enemy which the law of estoppel was invented to exclude. So far however is this from being the case, that its object is to repress fraud and harassing litigation, and to render men truthful in their dealings with each other; and there can be no question that, rightly understood and properly applied, it often produces those effects, and is a valuable auxiliary in the hands of justice. The definition given in the Termes de la Ley (*n*) is much better: "Estoppel is when one man is concluded and forbidden in law to speak against his own act or deed; yea, though it be to say the truth." Still "forbidden to say the truth" sounds harsh; and both definitions are inadequate, as not including all the cases to which the term "Estoppel" is applicable. On the whole, an estoppel seems to be when, in consequence of some act, generally speaking some act to which he is either party or privy, a person is precluded from shewing the existence of a particular state of facts. Estoppel is based on the maxim, "Allegans contraria non est audiendus" (*o*); and is that species of præsumptio juris et de jure where the fact presumed is taken to be true, not as against all the world, but as against a particular party, and that only by reason of some act done:—it is in truth a kind of argumentum ad hominem (*p*). Hence it appears that "Estoppels" must

(*m*) Co. Litt. 352 a. See also 2 Co. 4 b.

(*n*) Termes de la Ley, tit. Estoppel. See to the same effect, 1 Lill. Pr. Reg. 542.

(*o*) 4 Inst. 279; Jenk. Cent. 2, Cas. 63; Broom's Max. 169, 4th Ed.

(*p*) See the judgment of the court in *Collins* v. *Martin*, 1 B. & P. 648.

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not be understood as synonymous with "Conclusive evidence;" the former being conclusions drawn by law against parties from particular facts, while by the latter is meant some piece or mass of evidence, sufficiently strong to generate conviction in the mind of a tribunal (*q*), or rendered conclusive on a party, either by common or statute law.

Use of.

§ 534. "Estoppels," observes John W. Smith, is "a head of law once tortured into a variety of absurd refinements, but now almost reduced to consonancy with the rules of common sense and justice. * * * In our old law books truth appears to have been frequently shut out by the intervention of an estoppel, where reason and good policy required that it should be admitted. * * * * However, it is in no wise unjust or unreasonable, but, on the contrary, in the highest degree reasonable and just, that some solemn mode of declaration should be provided by law, for the purpose of enabling men to bind themselves to the good faith and truth of representations on which other persons are to act. *Interest reipublicæ ut sit finis litium*—but, if matters which have been once solemnly decided were to be again drawn into controversy, if facts once solemnly affirmed were to be again denied whenever the affirmant saw his opportunity, the end would never be of litigation and confusion. It is wise, therefore, to provide certain means by which a man may be concluded, not from saying the truth, but from saying that that which, by the intervention of himself or his, has once become accredited for truth, is false. And probably no code, however rude, ever existed without some such provision for the security of men acting, as all men must, upon the representations of others" (*r*). "The courts have

(*q*) See the observations of the Barons in *Machu* v. *The London and South Western Railway Company*, 2 Exch. 415.

(*r*) 2 Smith, Lead. Cas. 656, 5th Ed. See also per Curiam, in

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been, for some time, favourable to the utility of the doctrine of estoppel, hostile to its technicality. Perceiving how essential it is to the quick and easy transaction of business, that one man should be able to put faith in the conduct and representations of his fellow, they have inclined to hold such conduct and such representations binding, in cases where a mischief or injustice would be caused by treating their effect as revocable. At the same time, they have been unwilling to allow men to be entrapped by formal statements and admissions, which were perhaps looked upon as unimportant when made, and by which no one ever was deceived or induced to alter his position. Such estoppels are still, as formerly, considered *odious*" (*s*).

Principal rules relative to.

1. Must be mutual or reciprocal.

§ 535. Several rules respecting estoppels are to be found in the books. The most important are the following, 1. That estoppels must be mutual or reciprocal, i. e. binding both parties (*t*). But this does not hold universally; for instance, a feoffor, donor, lessor, &c. by deed poll will be estopped by it, although there is no estoppel against the feoffee, &c. (*u*). John W. Smith, in the work already cited (*x*), thinks the rule will be found to apply to those cases only where *both parties* are *intended* to be bound.

2. In general only affect parties and privies.

§ 536. 2. In general estoppels affect only the parties and privies to the act working the estoppel; strangers are not bound by them, and cannot take advantage of them (*y*). When, however, the record of an estoppel runs to the disability or legitimation of the person, strangers shall both take the benefit of, and be con-

Cuthbertson v. *Irving*, 4 H. & N. 758.

(*s*) 2 Smith, Lead. Cas. 725—6, 5th Ed.

(*t*) Com. Dig. Estoppel, B.; Co. Litt. 352 a; Cro. Eliz. 700, pl. 16.

(*u*) Co. Litt. 47 b; 363 b.

(*x*) 2 Smith, Lead. Cas. 660, 5th Ed.

(*y*) Co. Litt. 352 a; Com. Dig. Estoppel, B. & C.

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cluded by, that record; as in case of outlawry, excommunication, profession, attainder of præmunire, of felony, &c. (*z*). But a record concerning the name, quality, or addition of the person has not this effect (*a*).

3. Conflicting estoppels neutralize each other.

§ 537. 3. It seems that conflicting estoppels neutralize each other, or, as our books express it, "Estoppel against estoppel doth put the matter at large" (*b*). Thus, if the plaintiff in an action makes title to a common by grant within time of memory, and then in another action between the same parties makes title by prescription, and the other admits this, this last estoppel shall avoid the first estoppel, so that the plaintiff may make title to the common by prescription (*c*). So, where in a præcipe quod reddant against two, who pleaded joint tenancy with a third, the demandant said that formerly he brought a writ against one of the two, who pleaded joint tenancy with the other, whereby the writ abated, on which he purchased this writ by journeys accounts, averring that the two were sole tenants on the day of the first writ, &c., whereon the tenants vouched the third party with whom they had pleaded joint tenancy: on its being objected, that this voucher could not be received, because they had supposed him joint tenant with them, it was answered that, as the plaintiff had alleged that the defendants were sole tenants, he had ousted himself of the right to estop them from that voucher (*d*).

Different kinds of.

§ 538. Estoppels are of three kinds (*e*). 1. By matter of record. 2. By deed (*f*). 3. By matter in pais.

(*z*) Co. Litt. 352 b.

(*a*) *Id.*

(*b*) *Id.*; 2 Smith, Lead. Cas. 660, 5th Ed.; *R.* v. *Haughton*, 1 E. & B. 506, per L. Campbell, C. J.

(*c*) 1 Ro. Abr. 874, pl. 50, citing 11 Hen. VI. 27 b, 28 a.

(*d*) Fitz. Abr. Estop. pl. 3, citing 41 Edw. III. 5, pl. 11. For other instances, see 1 Roll. Abr. 874, 875; and D'Anvers' Abridgment, Estoppel, S.

(*e*) Co. Litt. 352 a; 2 Smith, Lead. Cas. 657, 5th Ed.

(*f*) Coke (*in loc. cit.*) says,

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1. Estoppels by matter of record.

§ 539. 1. Estoppels by matter of record; as letters patent, fine, recovery, pleading, &c. (*g*). The most important form of this is estoppel by judgment, which will be considered under the head of res judicata (*h*).

Pleading.

§ 540. With respect to estoppels by pleading. A party not pleading within the time required by law, is taken to confess that his adversary is entitled to judgment. So a party may, by resorting to one *kind* of plea, be concluded from afterwards availing himself of another. It is a well-known rule of pleading, that pleas in abatement cannot be pleaded after a party has pleaded in bar, and that pleas to the jurisdiction cannot be pleaded after pleas in abatement.

Admissions in pleadings.

§ 541. As to the effect of admissions, express or implied, in pleadings: the following rule, which certainly savours of technicality, is laid down in the books: viz., that the material facts alleged by one party, which are directly admitted by the opposite party, or indirectly admitted by taking a traverse on some other facts, cannot be again litigated between the same parties, and are conclusive evidence between them, but only if the traverse is found against the party making it (*i*). Still whether, and to what extent, the admitting, or the passing over a traversable allegation in pleading, is to be deemed an admission of it for the purposes of *evidence* at the trial, is a question which has given rise to a considerable conflict of authority and opinion (*k*).

"matter in writing;" but it is clear that "deed" was meant; and in our old books the word "writing" is constantly used in that limited sense. See bk. 2, pt. 3, ch. 1, § 217, note (*k*), and § 225, note (*i*).

(*g*) Co. Litt. 352 a; Com. Dig. Estoppel, A. 1; 1 Roll. Abr. 862 *et seq.*, tit. Estoppel.

(*h*) *Infrà*, ch. 9.

(*i*) Per Parke, B., in delivering the judgment of the court in *Boileau* v. *Rutlin*, 2 Exch. 665. See *Robins* v. *Lord Maidstone*, 4 Q. B. 811; Brook. Abr. Protestacion, pl. 14; and Co. Litt. 124 b.

(*k*) The following are the principal cases on this subject:—*Ed-*

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2. Estoppels by deed.

§ 542. 2. Estoppels by deed. "Nemo contra factum suum proprium venire potest" (*l*). "A deed," says Mr. Justice Blackstone (*m*), "is the most solemn and authentic act that a man can possibly perform, with relation to the disposal of his property; and therefore a man shall always be *estopped* by his own deed, or not permitted to aver or prove anything in contradiction to what he has once so solemnly and deliberately avowed." This, however, must be understood of those parts of the deed where the party does solemnly and deliberately avow something; consequently it is a rule, that a *general* recital or rehearsal in a deed has not the effect of an estoppel (*n*). This is on the principle "generale nihil certum implicat" (*o*); it being a rule that an estoppel must be certain to every intent, and is not to be taken by argument or inference (*p*); and therefore a *special* recital of a particular fact in a deed will estop (*q*). Many cases illustrative of this distinction are to be found in the reports (*r*); and the principle governing the subject has thus been laid down: "It seems clear that where it can be collected from the deed, that the parties to it have agreed upon a certain admitted state of facts as the basis on which they contract, the statement of those facts, though but in the way of recital, shall estop the parties to aver the contrary" (*s*). Perhaps

Recitals.

munds v. *Groves*, 2 M. & W. 642; *Bennion* v. *Davison*, 3 *Id.* 179; *Smith* v. *Martin*, 9 *Id.* 304; *Carter* v. *James*, 13 *Id.* 137; *Buckmaster* v. *Meiklejohn*, 8 Exch. 634; *Bingham* v. *Stanley*, 2 Q. B. 117; *Robins* v. *Lord Maidstone*, 4 *Id.* 811; *Bonzi* v. *Stewart*, 4 M. & Gr. 295; *Fearn* v. *Filica*, 7 *Id.* 513.

(*l*) 2 Inst. 66; Lofft, M. 322.

(*m*) 2 Blackst. Com. 295.

(*n*) 32 Hen. VI. 16; 35 *Id.* 34; 2 Leon. 11, pl. 17. See the judgment in *Lainson* v. *Tremere*, 1 A. & E. 801—2.

(*o*) 2 Co. 33 b; 8 Co. 98 a.

(*p*) Co. Litt. 352 b and 303 a.

(*q*) See 2 Smith, L. C. 706, 5th Ed.; 1 Wms. Saund. 216, 6th Ed.; *Lainson* v. *Tremere*, 1 A. & E. 792; *Carpenter* v. *Buller*, 8 M. & W. 209.

(*r*) See 1 Rol. Abr. 872, Estoppel (P); 1 Wms. Saund. 216, 6th Ed.; 3 Leon. 118, pl. 168.

(*s*) Per Coltman, J., in delivering the judgment of the C. P.

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this would have been more correct if, instead of saying merely, "the parties have agreed," it had been added, "or must be taken to have agreed." When a recital is intended to be the statement of one party only, the estoppel is confined to that party, and the intention is to be gathered from construing the instrument(*t*).

3. Estoppels by matter in pais.

§ 543. 3. Estoppels by matter in pais. Of these, Parke, B., in delivering the elaborate judgment of the Court of Exchequer, in *Lyon* v. *Reed*(*u*), says, "The acts in pais which bind parties by way of estoppel are but few, and are pointed out by Lord Coke, Co. Lit. 352 a. They are all acts which anciently really were, and in contemplation of law have always continued to be, acts of notoriety, not less formal and solemn than the execution of a deed, such as *livery*, *entry*, *acceptance of an estate*, and the like. Whether a party had or had not concurred in an act of this sort, was deemed a matter which there could be no difficulty in ascertaining, and then the legal consequences followed." But, for the reasons already stated(*x*), the courts of law in modern times, adopting a principle long known in courts of equity(*y*), have wisely extended this species of estoppel beyond its ancient limits: and although the actual decisions respecting its application in certain cases may admit of question, the following rule has been laid down by authority, and may be looked on as established. "Where one by his words or conduct wilfully causes another to believe the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is concluded

in *Young* v. *Raincock*, 7 C. B. 338; recognized and confirmed in *Stroughill* v. *Buck*, 14 Q. B. 787.

(*t*) *Stroughill* v. *Buck*, 14 Q. B. 787.

(*u*) 13 M. & W. 285, 309. See also the judgment of Tindal, C. J., in *Sanderson* v. *Collman*, 4 Man. & Gr. 209.

(*x*) *Suprà*, § 534.

(*y*) 1 Fonbl. Eq. bk. 1, ch. 3, sect. 4, 3rd Ed.

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from averring against the latter a different state of things as existing at the same time" (*z*). The application of this rule, however, is said to be limited to cases in which the representation amounts to an agreement or licence by the party who makes it, or is understood by the party to whom it is made, as amounting to that (*a*). Moreover, by "wilfully" in this rule must be understood, if not that the party represents that to be true which he knows to be untrue, at least, that he *means* his representation to be acted upon, and that it is acted upon accordingly; and if, whatever a man's real intention may be, he so conducts himself that a reasonable man would take the representation to be true, and believe that it was meant that he should act upon it, and did act upon it as true, the party making the representation would be equally precluded from contesting its truth (*b*). And conduct, by negligence or omission, where there is a duty cast upon a person by usage of trade or otherwise, to disclose the truth, may often have the same effect. As, for instance, a retiring partner omitting to inform his customers of the *fact*, in the usual mode, that the continuing partners were no longer authorized to act as his agents, is bound by all contracts made by them with third persons, on the faith of their being so authorized (*c*).

How made available.

§ 544. It has been made a question, whether estoppels

(*z*) *Pickard* v. *Sears*, 6 A. & E. 469, 474; *Freeman* v. *Cooke*, 2 Exch. 654, 633; *Howard* v. *Hudson*, 2 E. & B. 1; *Simpson* v. *The Accidental Death Insurance Company*, 2 C. B., N. S. 289; *Dunston* v. *Paterson*, *Id.* 495, 501—4; *Clarke* v. *Hart*, 6 Ho. Lo. Cas. 633, 644, 655—6, 669; *Cornish* v. *Abington*, 4 H. & N. 549; *Gregg* v. *Wells*, 10 A. & E. 90.

(*a*) *Freeman* v. *Cooke*, 2 Exch. 654, 664; *Clarke* v. *Hart*, 6 Ho. Lo. Cas. 633, 644, 656; *Cornish* v. *Abington*, 4 H. & N. 549.

(*b*) *Freeman* v. *Cooke*, 2 Exch. 654, 663; *Howard* v. *Hudson*, 2 E. & B. 1; *Cornish* v. *Abington*, 4 H. & N. 549, 555; *White* v. *Grecnish*, 11 C. B., N. S. 209, 230.

(*c*) *Freeman* v. *Cooke*, 2 Exch. 654, 663. See also *The Western Bank of Scotland* v. *Needell*, 1 F. & F. 461.

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in pais can be *pleaded;* the objection being, that to plead matter in pais by way of estoppel, is a violation of the rule of pleading which prohibits the putting on the record any matter of evidence, however conclusive. But the point having been expressly raised on demurrer to a replication, in a case of *Sanderson* v. *Collman* (*d*), was unanimously overruled by the Court of Common Pleas. Tindal, C. J., there said, "If we find upon the record, a fact which would have entitled the plaintiffs to a verdict, I do not see why they may not rely upon that fact by way of estoppel. Estoppel may be by matter of record, by deed, and by matter in pais. If by the last branch, is meant only that the matter may be given in evidence, it would certainly not be pleadable, and ought not to be put on the record. But there seems to be no reason why the meaning should be so confined. * * * * Lord Coke, speaking of estoppel by matter in pais, refers to estoppel by acceptance of rent; and it may be said that this naturally would be matter of evidence; but looking at the whole of the context, he appears to me to be treating it as being on the record, rather than as a matter for the jury." And Coltman, J., adds, "The meaning of the rule, I apprehend, is, that a party shall not plead facts from which another fact, material to the issue, is to be *inferred.* * * * * I think that if a party has a legal defence to that which is set up against him, he cannot be precluded from pleading such defence." There is, however, this great distinction between estoppels by record or by deed and estoppels in pais, namely, that the former must, in order to make them binding, be pleaded, *if there be an opportunity,* otherwise the party omitting to plead the estoppel waives it, and leaves the issue at large, on which the jury may find according to the truth; while with respect to estoppels in pais, they need not, at least in most cases, be pleaded in order to

(*d*) *Sanderson* v. *Collman*, 4 Man. & Gr. 209. See ad id. *Hallifax* v. *Lyle*, 3 Exch. 446.

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make them obligatory (*e*). Thus, where a man represents another as his agent, in order to procure a person to contract with him as such, and he does contract, the contract binds in the same manner as if he had made it himself, and is his contract in point of law; and no form of pleading could leave such a matter at large, and enable the jury to treat it as no contract (*f*). This distinction is said not to be recognized in America (*g*); and it has been objected to on the ground, that it appears inconsistent that the principle of the authority of res judicata should govern the decision of a *court*, when the matter is referred to them by pleading the estoppel, but that a *jury* should be at liberty to disregard this principle altogether; and that the operation of such an important principle as that of res judicata, should depend upon the technical forms of pleading in particular actions (*h*). But the distinction is not without reason. Where a party intends to conclude another by an estoppel, he ought to give him an opportunity of deliberately replying to it, and not spring it upon him at Nisi Prius. With due notice the adversary might be able to shew that the matter relied on as an estoppel was not such in reality, as not relating to the property or transaction in controversy; or, if it were, that its effect had been removed by matter subsequent, as, for instance, that the party pleading the estoppel had by some other proceeding concluded himself from taking the objection,—estoppel against estoppel setting the matter at large (*i*);—or, when the estoppel relied on is a judgment, that that judgment was reversed on error, or deprived of binding force by an act of parliament, &c. The wilfully keeping back an estoppel is not

(*e*) *Freeman* v. *Cooke*, 2 Exch. 654, 662; 1 Wms. Saund. 325 a, n. (*d*), 6th Ed.; 2 Smith, Lead. Cas. 672, 707, 709, 5th Ed.; *Treviban* or *Trevivan* v. *Lawrence*, 2 Lord Raym. 1036 and 1048; 1 Salk. 276; *Magrath* v. *Hardy*, 4 Bingh. N. C. 782; *Lord Feversham* v. *Emerson*, 11 Exch. 385.

(*f*) *Freeman* v. *Cooke*, 2 Exch. 654, 662.

(*g*) 1 Greenl. Ev. § 531, 7th Ed.

(*h*) Ph. & Am. Ev. 512.

(*i*) *Suprà*, § 537.

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only evidence of unfair dealing and a desire to surprise; but the divesting it of its conclusive effect is a just punishment on the party who has unnecessarily called the jury together, and wantonly occasioned the expense of a trial. It may be asked, why then are estoppels by matter in pais conclusive on the jury, seeing that they may be pleaded? That is probably a remnant of the old notion, that matters in pais were matters of notoriety to the jury coming de vicineto (*k*), who therefore ought not to be required to find against their personal knowledge; whereas deeds and judgments are dead proofs (*l*); the former of which were supposed to lie in the peculiar knowledge of the witnesses, and the latter being on record in the courts.

Whether "Allegans suam turpitudinem non est audiendus" is a maxim of the *common* law.

§ 545. Before dismissing the subject of estoppel, we would direct attention to the question, whether the maxim of the *civil* law, "Allegans suam turpitudinem (or suum crimen) non est audiendus," is, or ever was, a maxim of the *common* law. Littleton (*m*) puts the following case, "If a man be disseised, and the disseisor maketh a feoffment to divers persons to his use, and the disseisor continually taketh the profits, &c., and the disseisee release to him all actions reals, and after he sueth against him a writ of entry in nature of an assize by reason of the statute, because he taketh the profits, &c. Quære, how the disseisor shall be aided by the said release; for if he will plead the release generally, then the demandant may say, that he had nothing in the freehold at the time of the release made; and if he plead the release specially, then he must acknowledge a disseisin, and then may the demandant enter into the land, &c. by his acknowledgment of the disseisin, &c. But peradventure by special pleading he may bar him of the action which he sueth, &c. though the demandant

(*k*) See *supra*, § 543.
(*l*) Bk. 1, pt. 2, § 119.
(*m*) Sect. 499.

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may enter." Sir Edward Coke (*n*), in commenting on the words "he must acknowledge a disseisin," gives the following case:—"In a writ of dower the tenant pleaded that before the writ purchased A. was seised of the land, &c. until by the tenant himself he was disseised, and that hanging the writ A. recovered against him, &c.; judgment of the writ, and adjudged a good plea, in which the tenant confessed a disseisin in himself." For this is cited 15 Edw. IV. 4 B. (*o*), and correctly, except that instead of "recovered against him," it should be "re-entered upon him." There are some other cases in the Year Books to the same effect. Thus in the 5 Edw. IV. 5 B. pl. 23, in a præcipe quod reddat, the tenant shewed that long before the writ purchased, one H. was seised until disseised by him, and that H. entered hanging the writ, judgment of the writ, and adjudged good plea as was said; the reporter, however, adding, "Sed non interfui." And in the case already cited from the 15 Edw. IV., Littleton himself is reported to have put this case, which however goes much beyond the others, "If I disseise P. and levy a fine to you, and then P. enters upon you, and enfeoffs me and you enter on me, and I bring an assize, and you plead the fine in bar, I may avoid the fine by the matter aforesaid, so a man may take advantage of his wrong done by himself, &c." But, on the other hand, Sir Edward Coke either forgot these authorities and the passage in his own first Institute, or he supposed some distinction between pleading and evidence as to the principle in question; for in the 4 Inst. 279, when speaking of witnesses, he lays down the maxim in its terms, "Allegans suam turpitudinem non est audiendus;" but only cites for it a case of *Rich. de Raynham*, in the C. P. in 13 Edw. I. But in *Collins* v. *Blantern* (*p*), in 1767, which has become a leading

(*n*) Co. Litt. 287 a.
(*o*) Pl. 7.
(*p*) 2 Wils. 341.

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case (*q*), it was held, that to an action on a bond the defendant may plead that it was given by him for an illegal and corrupt consideration. In *Lutterell* v. *Reynell* (*r*), T. 29 Car. II., which was an action of trespass for taking money, on its being excepted against the plaintiff's evidence, that if it were true it destroyed the plaintiff's action, inasmuch as it amounted to prove the defendant guilty of felony; it was, says the reporter, "agreed that it should not lie in the mouth of the party to say that himself was a thief, and therefore not guilty of the trespass." On the trial of Titus Oates for perjury in 1685 (*s*), the court rejected the testimony of a person who came to swear that he had, by persuasion of the defendant, perjured himself on a former occasion; Lord Chief Justice Jefferies pronouncing such evidence to be "very nauseous and fulsome in a court of justice." So on the trial of Elizabeth Canning for perjury, in 1754 (*t*), on the question being raised, Legge, B., said, "I believe witnesses have very often been called, that have declared they have been perjured in other instances; but I will never admit or suffer a person, that will say they have been perjured in another affair, and I knew it before they were sent for. When she (i. e. the witness) swears true I cannot tell; but that she has sworn false once, I must know." On counsel observing that in the case of subornation of perjury, such were admitted every day, Legge, B., answered, "they are admitted, but it goes so much to their credit." The recorder (Moreton) expressed a similar opinion, and referred to the case of *Titus Oates*. It is very difficult indeed to see a distinction in this respect between perjury and subornation—why an avowal of perjury on a former occasion should be an objection to competency in the one case, and only to credit in the other. The maxim

(*q*) See that case and the note to it, 1 Smith, L. C. 310, 5th Ed.

(*r*) 1 Mod. 282.

(*s*) 10 Ho. St. Tr. 1079, 1185, 6.

(*t*) 19 Ho. St. Tr. 283, 632, 633.

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in question was cited by Lord Mansfield as a maxim of the civil law in *Walton* v. *Shelley* (*u*), in 1786, which case was afterwards overruled (*v*). It has likewise been referred to in some others (*w*), but the decisions in such of them as can be supported would stand very well without it—most, if not all, proceeding on the unimpeachable principle that a man shall not be allowed to take advantage of his own guilt, wrong, or fraud (*x*).

§ 546. The modern authorities completely negative the existence of any such rule, so far as witnesses are concerned. It is now undoubted law that a witness, although not always bound to *answer* them, may be *asked* questions tending to criminate, injure, or degrade him (*y*). So, it is the constant practice in criminal cases to receive the evidence of accomplices, who depose to their own guilt as well as to that of the accused; and it is not even indispensable, although customary and advisable, that some material part of the story told by the accomplice should be corroborated by untainted evidence (*z*). The cases of *Titus Oates* and *Elizabeth Canning*, the chief authorities in favour of the maxim, were expressly overruled by the Court of King's Bench in *R.* v. *Teal* (*a*). That was a prosecution against Thomas Teal, Hannah S. and others for conspiring falsely to charge the prosecutor with being the father of a bastard child of Hannah S. A nolle prosequi having been entered as to Hannah S., she was examined as a witness to prove that she had, at the instigation of the defendant Teal, forsworn herself in deposing that the prosecutor was father of the child. A new trial

(*u*) 1 T. R. 296, 300.

(*v*) *Jordaine* v. *Lashbrook*, 7 T. R. 601.

(*w*) *Gibson* v. *Minet*, 1 H. Bl. 569, 597, per Gould, J.; *Findon* v. *Parker*, 7 Jurist, 903, 907; *Steadman* v. *Duhamel*, 1 C. B. 888, 889; *Mann* v. *Swann*, 14 Johns. 269, 273; *U. S.* v. *Leffler*, 11 Peters, 86 & 94.

(*x*) *Infrà*.

(*y*) Bk. 2, pt. 1, ch. 1.

(*z*) Bk. 2, pt. 1, ch. 2, § 171.

(*a*) 11 East, 307.

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being moved for on the ground that she was an incompetent witness, those cases were relied on; and it was also argued, that a person who admits himself to be an infidel is disqualified from giving evidence. The court however took a different view; and Lord Ellenborough said, "An infidel cannot admit the obligation of an oath at all, and cannot therefore give evidence under the sanction of it. But though a person may be proved on his own shewing, or by other evidence, to have forsworn himself as to a particular fact, it does not follow that he can never afterwards feel the obligation of an oath; though it may be a good reason for the jury, if satisfied that he had sworn falsely on the particular point, to discredit his evidence altogether. But still that would be no warrant for the rejection of the evidence by the judge; it only goes to the credit of the witness, on which the jury are to decide." In the subsequent case also of *Rands* v. *Thomas* (*b*), which was an action for goods furnished to a ship, the plaintiff, in order to shew the defendant to be a part-owner, proved that his name was upon the register as such, and also that after the time when the goods were furnished he had executed a bill of sale of his share to one Cooke; on whose oath the register was obtained, and he was stated in it to be a part-owner. The defendant proposed to call Cooke, to prove that he had inserted the defendant's name in the register without his privity or consent, on which it was objected that Cooke could not contradict the oath he had taken at the time of the registry. Graham, B., acceded to this view, and rejected the evidence; but the court set aside the verdict, on the authority of *R.* v. *Teal*, holding that the objection went only to the credit of the witness. So it is competent for a defendant who is sued on a contract, to plead and prove that, as between him and the plaintiff, such contract was illegal or immoral (*c*); but not that it was

(*b*) 5 M. & S. 244. (*c*) *Holman* v. *Johnson*, Cowp. 341, 343.

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merely fraudulent (*d*). For although a man may in a court of justice acknowledge his own wrong or fraud, it is a principle of law that he shall not be allowed to take advantage of it (*e*)—"Nullus commodum capere potest de injuriâ suâ propriâ" (*f*).

Section III.

Self-disserving statements in criminal cases.

Self-disserving statements in criminal cases.

§ 547. We come lastly to self-disserving statements in criminal cases; or, as they are most usually termed, "confessions." It treating this subject, we propose to consider,

1. Estoppels in criminal cases.
2. The admissibility and effect of extra-judicial self-criminative statements.
3. Infirmative hypotheses affecting self-criminative evidence.

Sub-Section I.

Estoppels in criminal cases.

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Estoppels in criminal cases.

§ 548. In this branch of the law there are, for obviously just reasons, few estoppels. The first and most

(*d*) *Jones* v. *Yates*, 9 B. & C. 532, 538.

(*e*) 1 Blackst. Comm. 443; Co. Litt. 148 b; 2 Inst. 713; *Montefiori* v. *Montefiori*, 1 W. Bl. 363; *Doe* d. *Roberts* v. *Roberts*, 2 B. & A. 367; *Doe* d. *Bryan* v. *Bancks*, 4 *Id.* 401, 409, per Best, J.; *Daly* v. *Thompson*, 10 M. & W. 309; *Findon* v. *Parker*, 11 *Id.* 675, 681; *Murray* v. *Mann*, 2 Exch. 538.

(*f*) Co. Litt. 148 b; Jenk. Cent. 4, Cas. 5. See Dig. lib. 50, tit. 17, l. 134.

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important is the estoppel by judicial confession. It may be taken as a rule of universal jurisprudence, that a confession of guilt, made by an accused person to a judicial tribunal having jurisdiction to condemn or acquit him, is sufficient to found a conviction (*g*), even where it may be followed by sentence of death; such confession being deliberately made, under the deepest solemnities, oftentimes with the advice of counsel, and always under the protecting caution and oversight of the judge (*h*). "Confessus in judicio pro judicato habetur, et quodammodo suâ sententiâ damnatur" (*i*). "Confessio facta in judicio omni probatione major est" (*j*). "Confessio in judicio est plena probatio" (*k*). Still, if the confession appears incredible, or any illegal inducement to confess has been held out to the accused, or if he appears to have any object in making a false confession, or if the confession appears to be made under any sort of delusion, or through fear and simplicity (*l*), the court ought not to receive it. So, if the offence charged is one of the class denominated "facti permanentis," and no other indication of a corpus delicti can be found (*m*), &c. The numerous instances which have occurred of the falsity of confessions, judicial as well as extra-judicial (*n*), traces of which are visible very early in our legal history (*o*), fully justify this course. In ordinary practice a plea of guilty is never recorded by English judges, at least in serious cases, without first solemnly warning the accused that it will not entitle him either to mercy or a

1. Judicial confession.

(*g*) 1 Greenl. Ev. § 216, 7th Ed. Tayl. Ev. § 792, 4th Ed.; Dig. lib. 42, tit. 2; Cod. lib. 7, tit. 59; Mascard. de Prob. Concl. 344, 345; Ayliffe, Parerg. Jur. Can. Angl. 545; 2 Hagg. Cons. Rep. 315; 1 Ev. Poth. § 798.

(*h*) Greenl. in loc. cit.

(*i*) 11 Co. 30 a. Acc. Cod. lib. 7, tit. 59; Dig. lib. 42, tit. 2, l. 1; *Id.* lib. 9, tit. 2, l. 25, § 2.

(*j*) Jenk. Cent. 2, Cas. 99.

(*k*) Jenk. Cent. 3, Cas. 73.

(*l*) Finch's Law, 29; Ayliffe, Parerg. Jur. Can. Angl. 545.

(*m*) See *suprà*, ch. 2, sect. 3, sub-sect. 2, §§ 441.

(*n*) See *infrà*, sub-sect. 3.

(*o*) 27 Ass. pl. 40; 22 Ass. pl. 71.

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mitigated sentence, and freely offering him leave to retract it and plead not guilty (*p*). For it is important to observe that the plea of not guilty by an accused person, is not to be understood as a moral asseveration of his innocence of the offence with which he is charged; it means no more than that he avails himself of the undoubted right vested in him by law, of calling on the prosecution to prove him guilty of that offence.

2. Pleading.

§ 549. 2. An accused person must plead the different kinds of pleas in their regular order—by pleading in bar he loses his right to plead in abatement, &c. (*q*).

3. Collateral matters.

§ 550. 3. An accused person may be estopped by various collateral matters which do not appear on record. Thus he cannot challenge a juror after he has been sworn (*r*), unless it be for cause arising afterwards (*s*): if he challenges a juror for cause he must shew all his causes together (*t*); and on a trial for high treason, if he means to object to a witness as misdescribed in the list of witnesses delivered under the 7 Ann. c. 21, and 6 Geo. 4, c. 50, he must take the objection on the voir dire; for it comes too late after the witness has been sworn in chief (*u*). In the case of *R.* v. *Frost* (*v*), which was an indictment for high treason, where the list of witnesses required by those statutes was not delivered in the manner therein prescribed, i. e. simultaneously with the copy of the indictment and jury panel; it was held, on a case reserved, by nine judges against six, that the objection came too late after the jury had been sworn and the indictment opened to them.

(*p*) 2 Hale, P. C. 225.
(*q*) 2 Hale, P. C. 175; *Cook's case*, 5 Ho. St. Tr. 1143.
(*r*) 2 Hale, P. C. 293.
(*s*) Hob. 235.
(*t*) 2 Hale, P. C. 274.
(*u*) *R.* v. *Frost*, 9 C. & P. 129, 183.
(*v*) 9 C. & P. 162 and 187.

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Sub-Section II.

THE ADMISSIBILITY AND EFFECT OF EXTRA-JUDICIAL SELF-CRIMINATIVE STATEMENTS.

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Admissibility of extra-judicial self-criminative statements.

Must be made *voluntarily*, or at least *freely*.

§ 551. Self-disserving evidence is not always receivable in criminal cases as it is in civil. There is this condition precedent to its admissibility, that the party against whom it is adduced must have supplied it *voluntarily*, or at least *freely*. It is an established principle of English law, that every confession or criminative statement ought to be rejected, which has either been extracted by physical torture, coercion, or duress of imprisonment; or been made after any inducement to confess has been held out to the accused, by, or with the sanction, express or implied, of any person having lawful authority, judicial or otherwise, over the charge against him, or over his person as connected with that charge. But in order to have this effect, the inducement thus held out must be in the nature of a promise of favour or threat of punishment; i. e. it must be calculated to convey to the mind of the accused that his condition, relative to the charge against him, will be rendered better or worse by his consenting or refusing to confess. If, therefore, it refers only to collateral advantages; as in the case of spiritual exhortations by a clergyman (*x*), &c., the confession or criminative statement will be receivable; as it also will when the sup-

(*x*) *R.* v. *Gilham*, 1 Mo. C. C. 186; *R.* v. *Wild*, *Id.* 452.

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posed influence of an illegal inducement to confess may fairly be presumed to have been dissipated, before the confession, by a warning, from a person in authority, not to pay any attention to it (*y*). The cases on the subject of what is an illegal inducement to confess are very numerous, and far from consistent with each other (*z*); and there can be little doubt that the salutary rule which excludes confessions unlawfully obtained, has been applied to the rejection of many not coming within its principle (*a*). All questions relating to the admissibility of extra-judicial confessorial statements are of course to be decided by the judge. Where on a confession being offered in evidence, it appeared that an illegal inducement to confess had been held out, but the answers of the witness were confused and contradictory as to whether that was before or after the confession, Parke, B., rejected it; saying, that the onus of proving that the confession was *not* made in consequence of an improper inducement, lay on the prosecution; and as it was impossible to collect from the answers of the witness whether such was the case or not, the confession could not be received (*b*).

Effect when received.

§ 552. With respect to the effect of extra-judicial confessions or statements when received, the rule is clear, that, unless otherwise directed by statute, no

Not conclusive.

such confession or statement, whether plenary or not plenary, whether made before a justice of the peace, or other tribunal having only an inquisitorial jurisdiction in the matter; or made by deed, or matter in pais;

(*y*) The 11 & 12 Vict. c. 42, s. 18, gives a form of caution to be given by justices of the peace to persons brought before them charged with offences. See also 18 & 19 Vict. c. 126, s. 3.

(*z*) A large number are collected in Arch. Crim. Plead. 198 *et seq.*, 15th Ed., and Rosc. Crim. Evid. 39 *et seq.*, 6th Ed.

(*a*) Tayl. Ev. § 796, 4th Ed.; 1 Phill. Ev. 408, 10th Ed.; *R.* v. *Baldry*, 2 Den. C. C. 430; *R.* v. *Moore*, *Id.* 522.

(*b*) *R.* v. *Warringham*, 15 Jur. 318; 2 Den. C. C. 430, 447, note.

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either amounts to an estoppel, or has any conclusive effect against an accused person, or is entitled to any weight beyond that which the jury in their conscience assign to it.

If believed, sufficient without other evidence.

§ 553. The necessity for clear and unequivocal proof of a corpus delicti (*c*), joined to the desire so strongly evinced by our law to protect parties from being unfairly prejudiced by false or hasty statements, gave rise to the doubt, whether a conviction can be supported on the mere extra-judicial self-criminative statement of an accused person (*d*). Modern authorities incline to the affirmative (*e*). Still such a principle should be acted on with great caution; for the numerous cases in which persons have wrongly accused themselves, or wrongly acknowledged themselves guilty of crimes, ought to render tribunals very careful of inflicting punishment, when the only proof of crime rests on the statement of the supposed criminal. On capital charges, and charges of murder especially, a double degree of caution is requisite—the truth of the statement should be carefully sifted, and every effort made to obtain evidence to confirm or disprove the corpus delicti. These considerations apply with increased force when a confession is not plenary.

Caution.

(*c*) See *supra*, ch. 2, sect. 3, sub-sect. 2, § 441.

(*d*) Matth. de Prob. cap. 1, N. 7; *R.* v. *Eldridge*, R. & R. C. C. 440; *R.* v. *White*, *Id.* 508.

(*e*) *R.* v. *Falkner*, R. & R. C. C. 481; *R.* v. *Tippet*, *Id.* 509; *R.* v. *Wheeling*, 1 Leach, C. L. 311, note. In the United States considerable difference of opinion seems to prevail on this subject. See 1 Greenl. Evid. § 217, 7th Ed.; Wharton, Americ. Crim. Law, 313, 3rd Ed.; Burrill, Circ. Evid. 498.

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Sub-Section III.

INFIRMATIVE HYPOTHESES AFFECTING SELF-CRIMINATIVE EVIDENCE.

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Infirmative hypotheses affecting self-criminative evidence.

§ 554. The infirmative hypotheses affecting self-criminative evidence deserve the deepest and most anxious attention. The professors of the civil law, on the revival of its study in Europe, attributed a peculiar virtue to the confessions of parties. It was pronounced a

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species of proof of so clear, excellent, and transcendant a nature, as to admit of no proof to the contrary (*f*). In a great degree connected with this notion was the practice of torturing suspected persons to extract confessions (*g*);—which, to the disgrace of the civil law in all its modifications (*h*), and likewise of the canon law (*i*), so long prevailed on the continent. The absurdity, to say nothing of the injustice and cruelty, of that practice has been too ably and two frequently exposed to require notice here (*k*)—its almost universal

(*f*) "Multum à doctoribus rei confessio. Probatio dicitur liquidissima, principalissima, illustrissima, adeò ut non admittat probationem in contrarium." Matthæus de Prob. cap. 1, N. 6. They also called it "probatio probatissima." Bonnier, Traité des Preuves, § 241. It would however be most unjust to charge this absurdity on the Roman law itself, which in express terms lays down "Si quis ultrò de maleficio fateatur, non semper ei fides habenda sit: nonnunquam enim aut metû, aut quâ aliâ de causâ in se confitentur." Dig. lib. 48, tit. 18, l. 1, § 27, where a strong instance of false confession is recorded. So in another place. "Si quis hominem vivum falso confiteatur occidisse, et postea paratus sit ostendere hominem vivum esse: Julianus scribit, cessare Aquiliam; quamvis confessus sit se occidisse; hoc enim solum remittere actori confessoriam actionem, ne necesse habeat docere, eum occidisse: cæterum occisum esse hominem à quocunque oportet." Dig. lib. 9, tit. 2, l. 23, s. 11. "Hoc apertiùs est circa vulneratum hominem: nam si confessus sit vulnerasse, nec sit vulneratus, æstimationem cujus vulneris faciemus? vel ad quod tempus recurremus?" *Id.* l. 24. "Proinde si occisus quidem non sit, mortuus autem sit, magis est, ut non teneatur in mortuo, licet fassus sit." *Id.* l. 25. See also Dig. lib. 48, tit. 18, l. 1, § 17; tit. 19, l. 27; lib. 11, tit. 1, l. 11, §§ 8 *et seq.*; lib. 42, tit. 2.

(*g*) Bonnier, Traité des Preuves, § 647.

(*h*) Introd. pt. 2, §§ 69, 70, note (*l*).

(*i*) Decret. Gratian, Pars 2, Causa 5, Quæst. 5, cap. 4; Constit. Clement. lib. 6, tit. 3, cap. 1, § 1.

(*k*) The civilians professed to found all their labours on the Roman law. We have seen in note (*f*) how grievously they departed from it in one instance, and others might be adduced. On the subject of torture indeed they copied their original more faithfully; and yet it would be difficult to find a stronger exposition of the absurdity and danger of the practice, than in the following language of the Digest itself. "Quæstioni fidem non semper, nec tamen nunquam habendam, Constitutionibus

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abandonment in our days is perhaps its severest condemnation. The fallacy also of attributing a conclusive effect to confessorial evidence was detected by the intelligence of later times (*l*), and has been abundantly confirmed by experience. Why must a confession of guilt necessarily be true? Because, it is argued, a person can have no object in making a false confessorial statement, the effect of which will be to interfere with his interest by subjecting him to disgrace and punishment; and consequently the first law of nature—self-preservation—may be trusted as a sufficient guarantee for the truth of any such statement. This reasoning is however more plausible than sound. Conceding that every man will act as he deems best for his own interest; still, (besides the possibility of his misconceiving facts or law,) he may not only be most completely mistaken as to what constitutes his true interest, but it is an obvious corollary from the proposition itself, that when the human mind is solicited by conflicting interests the weaker will give place to the stronger: and consequently, that a false confessorial statement may be expected, when the party sees a motive, sufficient in his judgment to outweigh the inconveniences which will accrue to him from making it. Now, while the punishment denounced by law against offences is visible to all mankind, not only are the motives which induce a per-

declaratur: etenim res est fragilis, et periculosa, et quæ veritatem fallat. Nam plerique patientiâ sive duritiâ tormentorum ita tormenta contemnunt, ut exprimi eis veritas nullo modo possit: alii tantâ sunt impatientiâ, ut (in) quovis mentiri, quàm pati tormenta velint: ita fit, ut etiam vario modo fateantur, ut non tantùm se, verumetiam alios commineantur." Dig. lib. 48, tit. 18, l. 1, § 23. Notwithstanding all this, the compilers of the Digest retained the practice of torture in the Roman law, and the cases in which it might be resorted to are carefully pointed out in the same title, and stand side by side with the above passage.

(*l*) The later civilians were fully sensible of this fallacy. See Mascard. de Prob. Quæst. 7; Matthæus de Prob. cap. 1, NN. 4 and 6; 1 Hagg. Cons. Rep. 304.

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son to avow delinquency confined to his own breast; but those who hear the confessorial statement often know little or nothing of the confessionalist, far less of the innumerable links by which he may be bound to others who do not appear on the judicial stage. The force of these considerations will be better appreciated, when we come to examine separately the principal motives to false confessions (*m*); but first, as connected with the whole subject, must be noted a marked distinction between our judicature and that of most foreign nations.

Continental practice.

§ 555. In the mediæval tribunals of the civil and canon laws the *inquisitorial* principle was essentially dominant. And this has so far survived, that in many continental tribunals at the present day, every criminal trial commences with a rigorous interrogation of the accused, by the judge or other presiding officer. Nor is this interrogation usually conducted with fairness towards the accused. Facts are garbled or misrepresented, questions assuming his guilt are not only put, but pressed and repeated in various shapes; and hardly any means are left untried to compel him, either directly or by implication, to avow something to his prejudice. This is no chimerial danger. By artful questioning and working on their feelings, weak-minded individuals can be made to confess or impliedly admit almost anything; and to resist continued importunities to acknowledge even falsehood, requires a mind of more than average firmness (*n*). The common law of England

(*m*) *Infrà.*

(*n*) Look at the trial, if *trial* it can be called, of C. Silanus before the Emperor Tiberius. "Multa aggerebantur etiam insontibus periculosa * * * * non temperante Tiberio quin premeret voce, vultu, eò quòd ipse creberrimè interrogabat; neque refellere aut eludere dabatur; ac sæpe etiam confitendum erat, ne frustrà quæsivisset." Tacitus, Annal. lib. 3, cap. 67. A good instance is to be found in the trial of the Duc de Praslin, in 1847, which having taken place

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proceeds in a way quite the reverse of all this: holding that the onus of proving the guilt of the accused lies on

before the Chamber of Peers, at that time the highest tribunal in France, may fairly be supposed to have been conducted with the strictest regularity. The duke was charged with the murder of his wife, and the following is part of his interrogation by the president.

"Was she (the deceased) not stretched upon the floor where you had struck her for the last time?"—"Why do you ask me such a question?"

Then follow these questions and answers.

"You must have experienced a most distressing moment when you saw, upon entering your chamber, that you were covered with the blood which you had just shed, and which you were obliged to wash off?"—"Those marks of blood have been altogether misinterpreted. I did not wish to appear before my children with the blood of their mother upon me."

"You are very wretched to have committed this crime?"—(The accused makes no answer, but appears absorbed.)

"Have you not received bad advice, which impelled you to this crime?"—"I have received no advice. People do not give advice on such a subject."

"Are you not devoured with remorse, and would it not be a sort of solace to you to have told the truth?"—"Strength completely fails me to-day."

"You are constantly talking of your weakness. I have just now asked you to answer me simply 'yes,' or 'no.'"—"If any body would feel my pulse, he might judge of my weakness."

"Yet you have had just now sufficient strength to answer a great many questions in detail. You have not wanted strength for that."—(The accused makes no reply.)

"Your silence answers for you that you are guilty."—"You have come here with a conviction that I am guilty, and I cannot change it."

"You can change it if you give us any reason to believe the contrary; if you will give any explanation of appearances that are inexplicable upon any other supposition than that of your guilt."—"I do not believe I can change that conviction on your mind."

"Why do you believe that you cannot change that conviction?"—(The accused, after a short silence, said that he had not strength to continue.)

"When you committed this frightful crime did you think of your children?"—"As to the crime, I have not committed it; as to my children, they are the subject of my constant thoughts."

"Do you venture to affirm that you have not committed this crime?"—(The accused, putting his head between his hands, remained silent for some moments, and then said) "I cannot answer such a question." (11 Jur. 365, Part 2.)

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the accuser, and that no person is bound to criminate himself; according to the maxim, "Nemo tenetur seipsum prodere"(*o*). It has therefore always abstained from physical torture,—"Cruciatus legibus invisi"(*p*); —and taken great care, perhaps too great care, to prevent suspected persons from being terrified, coaxed, cajoled, or entrapped into criminative statements (*q*); and it not only prohibits judicial interrogation in the first instance, but if the evidence against the accused fails in establishing a primâ facie case against him, will not even call on him for his defence. As however the introduction of judicial interrogation into this country has been warmly advocated by able jurists (*r*), we propose to examine briefly the claims of the conflicting systems.

§ 556. In favour of judicial interrogation it is argued, first, that it is the duty of courts of justice to use all available means to get at the truth of the matters in question before them; and as the accused must necessarily best know his own guilt or innocence, he is naturally the fittest person to be interrogated on that subject; and indeed that in many cases, often of the most serious nature, it would be impossible without his own

Arguments in favour of judicial interrogation.

(*o*) 3 Bulst. 50. See also 14 & 15 Vict. c. 99, s. 3.

(*p*) Lofft, M. 434. Whenever torture has been applied in England it was in virtue of some real or imaginary prerogative of the crown, for it could not be awarded in the ordinary course of law. The "peine, or prisone, forte et dure" may seem an exception to this, but in truth is not; for the object of it was to compel the accused to *plead*, i. e. say whether he was guilty or not, in order that the court might know whether they ought to proceed to sentence, or empannel a jury to try him.

(*q*) See *suprà*, sub-sect. 2, § 551. We speak of the *ordinary* practice of our tribunals; not of the state trials of former times, where every rule seems to have been reversed.

(*r*) Particularly Bentham. See his Judicial Evidence, Book 2, chap. 9; Book 5, chap. 7; Book 9, part 4, chaps. 2, 3, 4; and part 5, chap. 3, &c. See also a paper by Mr. Fitzjames Stephen; Papers of the Juridicial Society, vol. i. p. 456.

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testimony to prove crime against the accused. Secondly, that the rule which excuses a man from criminating himself, is a protection to none but the evil-disposed; for not only have innocent persons nothing to dread from interrogation, however severe, but the more closely the interrogation is followed up, the more their innocence will become apparent. And, lastly, that in declining to extract self-disserving statements from the accused himself, while it receives without scruple from the mouths of witnesses similar statements which he has made to them, the English law violates its own fundamental rule, which requires the best evidence to be given.

Arguments against it.

§ 557. Before considering what may be directly urged on the other side, it is essential to point attention to an important circumstance commonly lost sight of. In the English system, as in every other, the indictment, information, act of accusation, or whatever else it may be called, is a *general* interrogation of the accused to answer the matters charged; and every material piece of evidence adduced against him is a *question* to him, whereby he is required either to prove that the fact deposed to is false, or explain it consistently with his innocence. Any evidence or explanation he can give is not only receivable, but anxiously looked for by the court and jury; and, in practice, his non-explanation of apparently criminating circumstances always tells most strongly against a prisoner. What our law prohibits is the *special* interrogation of the accused—the converting him, whether willing or not, into a witness against himself; assuming his guilt before proof, and subjecting him to an interrogation conducted on that hypothesis. And here a question naturally presents itself—supposing the interrogation of accused persons advisable, by whom is it to be performed? There seem but two alternatives —the accuser or the court; and, if the extraction of

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truth be the *sole* object in view, why is not the accused to be interrogated on oath like other witnesses? But this and the subjecting the accused to the interrogation of the accuser, although sometimes advocated, is not the continental practice, where the interrogation of the accused is the act of the tribunal. And here a difficulty presents itself at the outset—how is an abuse of power in this respect to be rectified? Improper questions put to a witness by a party or his counsel may be objected to by the other side, and the judge determines whether the objection is well founded. But when the judge is the delinquent who is to call him to order? Decency and the rules of practice alike prohibit counsel from taking exception to questions put by the bench; and, indeed, the doing so would be appealing to a man against himself.

§ 558. But to test this important question by broader principles. First, then, the functions of tribunals appointed to determine causes are primarily and essentially *judicial*, not *inquisitorial*. The tribunal is to judge and decide; to supply the proofs – the materials for decision —belongs in general to the litigant parties: though the inquisitorial principle is recognized thus far, that the tribunal is empowered to extract facts from the instruments of evidence adduced, and in some cases to compel the production of others which have been withheld. In the next place, the proposition that it is the duty of courts of justice to use all available means to get at the truth of the matters in question before them, must be understood with these limitations; first, that those means be such as are likely to extract the truth in the majority of cases; and, secondly, that they be not such as would give birth to collateral evils, outweighing the benefit of any truth they might extract (*s*). Admitting,

(*s*) See Introd. pt. 2.

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therefore, that the *special* interrogation of accused persons might in some cases extract truth which otherwise would remain undiscovered; (indeed the same may be said of torture, duress of imprisonment, or any other violent means adopted to compel confession;) the law is fully justified in rejecting the use of such an engine, if on the whole prejudicial to the administration of justice. Now that sort of interrogation, even when conducted with the most honest intention, must, in order to be effective, assume the shape of cross-examination, and consequently involve the judge in an intellectual contest with the accused,—a contest unseemly in itself, dangerous to the impartiality of the judge, and calculated to detract from the moral weight of the condemnation of the accused, though ever so guilty. In gladiatorial conflicts of this kind, the practised criminal has a much better chance of victory than an innocent person, embarrassed by the novelty and peril of his situation; whose honesty would probably prevent his attempting a suppression of truth, however much to his prejudice; and whose inexperience in the ways of crime, were he in a moment of terror to resort to it, would insure his detection and ruin. But where the judge is dishonest or prejudiced, the danger increases immeasurably. The screw afforded by judicial interrogation would then supply a ready mode of compelling obnoxious persons, under penalty of condemnation for silence, to disclose their most private affairs; and corrupt governments would be induced, in order to get at the secrets of political enemies, or sweep them away by penal condemnation, to place unprincipled men on the bench, thus polluting justice at its source. In short, judicial interrogation, however plausible in theory, would be found in practice a *moral torture;* scarcely less dangerous than the physical torture of former times, and, like it, unworthy of a place in the jurisprudence of an enlightened country.

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False self-criminative statements.

Motives for sometimes impossible to ascertain.

§ 559. To return to the subject of false self-criminative statements. It is sometimes impossible to ascertain the motive which has led to a confession indisputably false. In November, 1580, a man was convicted and executed on his own confession, for the murder, near Paris, of a widow who was missing at the time, but who two years afterwards returned to her home (*t*). And the celebrated case of Joan Parry and her two sons, executed in this country in the seventeenth century, for the murder of a man named Harrison who reappeared some years afterwards, affords another instance. That conviction proceeded chiefly on the confession of one of the accused; whether the result of insanity, fear, improper inducements to confess, or the desire of revenge against his fellow prisoners, it is difficult to determine (*u*).

Two classes of. 1°. Resulting from MISTAKE..

§ 560. All false self-criminative statements are divisible into two classes—those which are the result of MISTAKE on the part of the confessionalist, and those which are made by him in expectation of BENEFIT. And the former are two-fold—mistakes of *fact* and mistakes of *law*.

1. Of *fact*.

§ 561. First, of mistakes of *fact*. A man may believe himself guilty of a crime either when none has been committed; or where a crime has been committed, but by another person. Mental aberration is the obvious origin of many such confessions. But the actors in a tragedy may be deceived by surrounding circumstances, as well as the spectators. A case has been cited in a former part of this work (*x*), where a girl

(*t*) Bonnier, Traité des Preuves, § 256. This seems the case referred to in Matthæus de Probat. cap. 1, N. 4.

(*u*) 14 Ho. St. Tr. 1312. See also the false confession by John Sharpe of the murder of Catharine Elmes, Ann. Reg. for 1833, Chron. 74.

(*x*) *Suprà*, ch. 2, § 447; Beck's Med. Jur. 766.

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died in convulsions while her father was in the act of chastising her very severely for theft, and he fully believed that she died of the beating; but it afterwards turned out she had taken poison on finding her crime detected. If the surgeon had not made a post-mortem examination, that man would have been indicted for homicide, and most probably would have pleaded guilty to manslaughter, at least. Instances frequently occur, where death from previously existing disease follows shortly after the unjustifiable infliction of wounds or blows, believed by the guilty party to have been fatal (*y*). So, a man may mistake for a robber a corpse which has been secretly conveyed into his chamber, inflict blows or wounds on it, and, discovering the mistake, consider himself guilty of homicide (*z*). A habitual thief may, by confounding one of his exploits with another, suppose and admit himself guilty of an offence in which he really bore no part (*a*); although, it must be acknowledged, that justice is not likely to suffer much from this. Under the present head may be classed some of the confessions of witchcraft that will be noticed presently (*b*).

2. Of *law*.

§ 562. 2. Next, as to mistakes of *law*. It should never be forgotten that all confessions avowing delinquency in general terms are, more or less, *confessiones juris;* and this will in a great degree explain, what to unreflecting minds seems so anomalous, the caution exercised by British judges in receiving a plea of guilty (*c*). The same observation of course applies, to all extra-judicial statements which are not mere relations of facts. And here one great cause of error is ignorance of the meaning of forensic terms (*d*); espe-

(*y*) See Taylor's Med. Jur. chap. 29, 7th Ed.

(*z*) See the story of the Little Hunchback in the Arabian Nights' Entertainments.

(*a*) 3 Benth. Jud. Ev. 157, 158.

(*b*) *Infrà*.

(*c*) *Suprà*, sub-sect. 1, § 548.

(*d*) 27 Ass. pl. 40. A woman was arraigned for having felo-

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cially where the accused, conscious of *moral*, is unaware that he has not incurred *legal* guilt. Thus, a man really guilty of fraud or larceny, might plead guilty to a charge of robbery, through ignorance that, in legal signification, the latter means a taking of property accompanied with violence to the person, though it is popularly used to designate any act of barefaced dishonesty. This is a mistake which formerly might have cost a man his life: and to this hour a person really guilty of manslaughter might, through ignorance, plead guilty of the capital offence of murder. Again, the distinction between larceny and aggravated trespass is sometimes very slight; so that an ignorant man, conscious that he cannot defend his right to property which he has taken, might plead guilty to a charge of larceny, where there had been no animus furandi.

2°. In expectation of BENEFIT.

§ 563. In the other class of false self-criminative statements, the statement is known by the confessionalist to be false, and is made in expectation of some *real or supposed benefit*. It is obviously impossible to enumerate the motives which may sway the minds of men to make false statements of this kind (*e*). First, many are made for ease, and to avoid vexation arising out of the charge; and in some of these cases the cause of the false statement is apparent, viz. when it is made to escape torture, either physical or moral (*f*). In others, it is less obvious. Weak or timorous persons, confounded at finding themselves in the power of the law; or alarmed at the testimony of false witnesses, or the circumstantial evidence against them; or dis-

1. To escape vexation.

niously stolen some bread: who said that she did it by command of her husband. And the justices through pity would not take her acknowledgment, but took the enquest, by which it was found that she did it by coercion of her husband against her will, whereupon she went quit, &c.

(*e*) See Benth. Jud. Ev. Book 5, chap. 6, sects. 2 and 3.

(*f*) See *suprà*, §§ 554 *et seq.*

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trustful of the honesty or capacity of their judges, hope by an avowal of guilt to obtain leniency at their hands (*g*).

§ 564. Moreover, an innocent man, accused or suspected of a crime, may deem himself exposed to annoyance at the hands of some person, to whom his

(*g*) A striking instance of this is afforded by the case of the two Boorns, who were convicted in the Supreme Court of Vermont, in Bennington county, in September term, 1819, of the murder of Russell Colvin, May 10, 1812. It appeared that Colvin, who was the brother-in-law of the prisoners, was a person of a weak and not perfectly sound mind; that he was considered burdensome to the family of the prisoners, who were obliged to support him; that on the day of his disappearance, being in a distant field, where the prisoners were at work, a violent quarrel broke out between them; and that one of them struck him a severe blow on the back of the head with a club, which felled him to the ground. Some suspicions arose at that time, that he was murdered; which were increased by the finding of his hat in the same field a few months afterwards. These suspicions in process of time subsided; but, in 1819, one of the neighbours having repeatedly dreamed of the murder, with great minuteness of circumstance, both in regard to his death and the concealment of his remains, the prisoners were vehemently accused, and generally believed guilty of the murder. Upon strict search, the pocket-knife of Colvin, and a button of his clothes, were found in an old open cellar in the same field, and in a hollow stump not many rods from it were discovered two nails and a number of bones, believed to be those of a man. Upon this evidence, together with their deliberate confession of the fact of the murder and concealment of the body in those places, they were convicted and sentenced to die. On the same day they applied to the legislature for a commutation of the sentence of death to that of perpetual imprisonment; which, as to one of them only, was granted. The confession being now withdrawn and contradicted, and a reward offered for the discovery of the missing man, he was found in New Jersey, and returned home, in time to prevent the execution. He had fled for fear that they would kill him. The bones were those of some animal. They had been advised, by some misjudging friends, that, as they would certainly be convicted upon the circumstances proved, their only chance for life was by commutation of punishment, and that this depended on their making a penitential confession, and thereupon obtaining a recommendation to mercy. 1 Greenl. Ev. § 214, note (2), 7th Ed.

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suffering as for that crime would be acceptable (*h*). To this class belong those cases, where the evidence necessary to establish the innocence of the confessionalist would bring before the world, in the character of a criminal, some eminent individual, whose reward for a false acknowledgment of guilt would be great, and whose vengeance for exposure might be terrible; or would be the means of disclosing transactions which it was the interest of many to conceal. Under circumstances like these, the accused is induced by threats or bribes to suppress the defence, and own himself the author of the crime imputed to him.

2. From collateral objects.

§ 565. But false self-criminative statements also arise from objects wholly collateral, relating either to the party himself or to others. 1. With respect to the first of these. 1. A false confession of an offence may be made with the view of stifling inquiry into other matters, as for instance, some more serious offence of which the confessionalist is as yet unsuspected (*i*).

1. Relating to the party himself.

1. To stifle inquiry into other matters.

2. Tædium vitæ.

§ 566. 2. The most fantastic shape of this anomaly springs from the state of mental unsoundness which is known by the name of *tædium vitæ* (*k*). Several instances are to be found, where persons tired of life have falsely accused themselves as the perpetrators of *capital* crimes, either purely fictitious, or if real, committed by others (*l*). In such cases the maxim of the continental

(*h*) 3 Benth. Jud. Ev. 124.

(*i*) *Id.*

(*k*) See Bacon's Essay on Death; Dig. lib. 29, tit. 5, l. 1, § 23; Matth. de Crimin. ad lib. 48 Dig. tit. 16, cap. 1, N. 2.

(*l*) A Frenchman named Hubert was convicted, and executed, on a most circumstantial confession of his having occasioned the great fire of London in 1666; "although," adds the historian, "neither the judges nor any present at the trial did believe him guilty, but that he was a poor distracted wretch weary of life, and chose to part with it in that way." Continuation of Lord Clarendon's Life, 352, 353.

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lawyers, "nemo auditur perire volens" (*m*), may be applied with advantage.

3. Relation between the sexes.

§ 567. 3. "In the relation between the sexes," says Bentham, when treating of the subject of false confessions (*n*), "may be found the source of the most natural exemplifications of this as of so many other eccentric flights. The female unmarried—punishment as for seduction hazarded, the imputation invited and submitted to, for the purpose of keeping off rivals, and reconciling parents to the alliance. The female married—the like imputation, even though unmerited, invited, with a view to marriage, through divorce." So sensible was the canon law of this country of the danger of false confessions from this source, that it would not allow adultery to be proved, (at least for the purpose of divorce à vinculo matrimonii,) by the unsupported confession, judicial or extra-judicial, of the guilty party (*o*). But it has been held by the Court for Divorce and Matrimonial Causes, established by 20 & 21 Vict. c. 85, that under that statute, a decree for dissolution of marriage may be granted if there be evidence, not open to exception, of admissions of her adultery by the wife, and without any other proof (*p*).

4. Vanity.

§ 568. 4. "Vanity," observes the jurist above quoted (*q*), "without the aid of any other motive, has been known (the force of the moral sanction being in

(*m*) Bonnier, Traité des Preuves, §§ 256 and 257; D'Aguesseau (Œuvres), tom. 4, p. 186; 5 Causes Célèbres, 454, Ed. Richer; Matth. in loc. cit.

(*n*) 3 Benth. Jud. Ev. 116, 117.

(*o*) See the Canons of 1597, cap. 6, and of 1604, cap. 105. Also the judgment of Sir William Scott in *Mortimer* v. *Mortimer*, 2 Hagg. Cons. Rep. 316; Gibs. Cod. Jur. Eccl. Angl. tit. 22, cap. 17, and Ought. Ordo Jud. tit. 213.

(*p*) *Williams* v. *Williams*, L. Rep., 1 P. & D. 29. And see, per Cockburn, L. C. J., *Robinson* v. *Robinson*, 1 Swab. & T. 393; 5 Jur., N. S. 392.

(*q*) 3 Benth. Jud. Ev. 117—18.

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these cases divided against itself) to afford an interest, strong enough to engage a man to sink himself in the good opinion of one part of mankind, under the notion of raising himself in that of another. False confessions, from the same motive, are equally within the range of possibility, in regard to all acts regarded in opposite points of view by persons of different descriptions. I insulted such or such a man: I wrote such or such a party pamphlet, regarded by the ruling party as a libel, by mine as a meritorious exertion in the cause of truth: I wrote such or such a religious tract, defending opinions regarded as heretical by the Established Church, regarded as orthodox by my sect." "Quam multi," says one of the ablest of the later civilians (*r*), "sunt gloriosi militis similes, qui triginta Sardos, sexaginta Macedones, centum Cilices uno die occidisse se gloriantur, atque etiam elephanto in Indiâ pugno perfregisse femur; quos pœnâ potiùs quam commiseratione dignos dixerit nemo." False statements of this kind are sometimes the offspring of a morbid love of notoriety at any price. The motive that induced the adventurous youth to burn the temple of Ephesus, would surely have been strong enough to induce him to declare himself, however innocent, the author of the mischief, had it occurred accidentally.

§ 569. 5. Several other instances may be found, of false confessions made with a view to some specific collateral end (*s*). The Amalekite who falsely accused himself of having slain Saul, presents an early and authentic instance (*t*). Soldiers engaged on foreign service, not unfrequently declare themselves guilty of having

5. Other instances.

(*r*) Matth. de Crimin. ad lib. 48 Dig. tit. 16, cap. 1, N. 3.

(*s*) Under this head comes the celebrated case of the slave Primitivus, who, to escape from his master, falsely accused himself and others of homicide. Dig. lib. 48, tit. 18, l. 1, § 27.

(*t*) 2 Sam. 1.

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committed crimes at home, in order that by being sent back to take their trial they may escape from military duty (*u*). Formerly when transportation was looked upon by many of the lower orders in the light of a boon rather than a punishment, offences were occasionally committed to provoke it; and it is not improbable that false confessions of offences committed by others were made with the same object.

2. When other parties are involved.

§ 570. 2. Hitherto we have been considering cases where the false confession is made with the view of benefiting the confessionalist himself. We now proceed to those in which other parties are involved. 1. The strongest illustrations of this are where the person who makes the false confession is desirous of *benefiting* others; as, for instance, to save the life, fortune, or reputation of, or to avert suffering from a party whose interests are dearer to him than his own (*x*). The less exalted motive of money has sometimes had the same effect (*y*).

1. Desire of *benefiting* others.

(*u*) False confessions of *desertion* are so common, that a special clause respecting them is inserted in the annual mutiny acts. See the last of these, 32 & 33 Vict. c. 4, s. 37.

(*x*) A singular instance of this is said to have taken place at Nuremberg, in 1787, where two women in great distress, in order to obtain for the children of one of them the provisions secured to orphans by the law of that country, falsely charged themselves with a capital crime. They were convicted; and one was executed, but the other died on the scaffold through excitement and grief at witnessing the death of her friend. Case of *Maria Schoning* and *Anna Harlin*, Causes Célèbres Etrangères, vol. 1, p. 200, Paris, 1827. A case is also mentioned where, after a serious robbery had been committed, a man drew suspicion of it on himself, and when examined before a magistrate dropped hints amounting to a constructive admission of his guilt; in order that his brothers, who were the real criminals, might have time to escape; and afterwards on his trial, the previous object having been attained, proved himself innocent by a complete alibi. 1 Chit. Crim. Law, 85. It is well known that persons have sometimes destroyed themselves with the view of benefiting their families.

(*y*) "On assure qu'en Chine il y a des personnes qui avouent pour autrui des délits légers, afin de subir la punition au lieu et place du véritable coupable, qui

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§ 571. 2. The desire of *injuring* others has occasionally led to the like consequence. Persons reckless of their own fate have sought to work the ruin of their enemies, by making false confessions of crimes and describing them as participators. We shall feel little surprise at this, when we recollect how often persons have inflicted grievous wounds on themselves, and even in some instances it is said committed suicide, in order to bring down suspicion of intended or actual murder on detested individuals (*z*). 2. Desire of injuring others.

§ 572. The anomaly of false confession is not confined to cases where there might have been a criminal or Confessions of impossible offences.

les indemnise ensuite largement." Bonnier, Traité des Preuves, § 256: no authority cited. A modern traveller also, speaking of China, says, "Persons condemned to death may procure a substitute, who can be found on payment of a sum of money." Berncastle's Voyage to China, vol. 2, p. 167. See Norton, Evid. 115; Goodeve, Evid. 573, ad id. We give these extraordinary statements as we find them.

After the publication of the third edition, the author received a letter on this subject from Mr. T. T. Meadows, British Consul at Newchwang, Northern China, in which he says, "I feel desirous of removing a doubt expressed at the end of your note (*z*), p. 690 (3rd edition), respecting Chinese substitutes in criminal cases. In 1847, I published a volume of 'Desultory Notes on the Government and People of China;' and the 13th note is headed 'On personating criminals.' * * * I think that note will satisfy you that the personation of criminals, and that in cases involving capital punishment, is a well-known fact. I have, since writing that note in 1846, spent fifteen years in active service in this country, four of them as consul at Ningpo and Shanghae in Middle China, and now four as consul at this port, the most northerly of the empire; and I can assure you that the custom exists everywhere throughout it. The thing is naturally not one very frequently done. But the term 'ting heung 頂兇 *lit. personate murderer*,' is probably as familiar to those conversant with Chinese criminal proceedings and laws as is, for instance, the English term 'turn Queen's evidence' to those conversant with English criminal proceedings. The inducement is not always money. Juniors in families have been known to personate their criminal seniors, and even domestic slaves or serfs their guilty masters to whom they were attached."

(*z*) See bk. 2, pt. 2, § 206.

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corpus delicti. Instances are to be found in the judicial histories of most countries where persons, with the certainty of incurring capital punishment, have acknowledged crimes now generally recognized as impossible. We allude chiefly to the prosecutions for witchcraft and visible communion with evil spirits, which in former ages, and especially in the seventeenth century, disgraced the tribunals of these realms. Some of them present the extraordinary spectacle of individuals, not only freely (so far as the absence of physical torture constitutes freedom) confessing themselves guilty of these imaginary offences, with the minutest details of time and place; but even charging themselves with having, through the demoniacal aid thus avowed, committed repeated murders and other heinous crimes (*a*). The cases in Scotland are even more monstrous than those in England (*b*), but there is strong reason to believe that in most of them the confession was obtained by torture (*c*); and the following sensible solution of the psychological phenomenon which they all

(*a*) See the cases of *Mary Smith*, 2 Ho. St. Tr. 1049; and of the *Three Devon Witches*, 8 Ho. St. Tr. 1017; the note to the case of the *Bury St. Edmond's Witches*, 6 Ho. St. Tr. 647; and the case of the *Essex Witches*, 4 Ho.St.Tr. 817, the latter especially. The confessions of Anne Cate, 4 Ho. St. Tr. 856, of Rebecca West, *Id.* 840, of Rose Hallybread, *Id.* 852, of Joyce Boanes, *Id.* 853, and of Rebecca Jones, *Id.* 854, are among the most remarkable; the two first of which are set out in the Appendix to this work, No. II.

(*b*) A large number of these are collected in Arnot's Collection of celebrated Criminal Trials in Scotland, pp. 347 *et seq.*, Edinb. 1785; and in Pitcairn's "Criminal Trials in Scotland," Edinb. 1833, tit. "Witchcraft," in the General Index. See in particular the case of Isobel Elliot, Sept. 13, 1678, who with *nine others judicially confessed to have been baptized by the devil, and to have had carnal copulation with him.* They were all convicted and burnt. (Arnot, 360, 361.) A similar confession was made by Issobell Gowdie, 13 April, 1662; Pitcairn, vol. 4, p. 602. See also the case of *Bessie Dunlop, Id.* vol. 2, p. 49.

(*c*) For a full description of the instruments of torture used for this purpose, see Pitcairn, vol. 2, pp. 50, 375, 376.

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present, is given by an eminent writer on the criminal law of the former country (*d*):—"All these circumstances duly considered; the present misery; the long confinement; the small hope of acquittal; the risk of a new charge and prosecution; and the certain loss of all comfort and condition in society; there is not so much reason to wonder at the numerous convictions of witchcraft on the confessions of party. Add to these motives, though of themselves sufficient, the influence of another, as powerful perhaps as any of them,—the unsound and crazy state of imagination in many of those unhappy victims themselves. In those times, when every person, even the most intelligent, was thoroughly persuaded of the truth of witchcraft, and of the possibility of acquiring supernatural powers, it is nowise unlikely that individuals would sometimes be found, who, either seeking to indulge malice, or stimulated by curiosity and an irregular imagination, did actually court and solicit a communication with evil spirits, by the means which in those days were reputed to be effectual for such a purpose. And it is possible, that among these there might be some who, in the course of a long and constant employment in such a wild pursuit, came at last to be far enough disordered, to mistake their own dreams and ravings, or hysteric affections, for the actual interviews and impressions of Satan." The following case is reported as having occurred in India in 1830. Three prisoners were made to confess before the police to having, by means of sorcery, held forcible connection with the wife of the prosecutor, then in the tenth month of her pregnancy, beat or otherwise illtreated her, and afterwards taken the child out of her womb, and introduced into it, in lieu thereof, the skin of a calf and an earthen pot, in consequence of which she died. These confessions were corroborated by the discovery in the

(*d*) Hume's Crim. Law of Scotland, vol. 1, p. 591.

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womb of the deceased of an earthen pot and a piece of calf's skin; but the prisoners were acquitted, principally on the ground, that the earthen pot was of a size that rendered it impossible to credit its introduction during life (*e*).

Additional infirmative hypotheses in extra-judicial confessorial statements.

§ 573. The above causes affect, more or less, every species of confessorial evidence. But *extra-judicial* confessorial statements, especially when not plenary, are subject to additional infirmative hypotheses, which are sometimes overlooked in practice. These are *mendacity* in the report; *misinterpretation* of the language used; and *incompleteness* of the statement (*f*). 1. "Mendacity." The supposed confessorial statement may be, either wholly or in part, a fabrication of the deposing witnesses. And here it should not be forgotten, that of all sorts of evidence that which we are now considering is the most easy to fabricate, and, however false, the most difficult to confront and expose by any sort of counter-evidence, direct or circumstantial (*g*). 2. "Misinterpretation." No act or word of man, however innocent or even laudable, is exempt from this. E. g. a paper in the handwriting of the accused is found in his possession, in which he is spoken of as guilty of the offence imputed to him. This is consistent with his guilt; but, on the other hand, that paper may be a libel on him, which the accused has kept with a view of refuting the libel, or of bringing the libeller to justice (*h*). Again, entirely fallacious conclusions may be drawn from language uttered in jest, or by way of bravado (*i*); as

1. Mendacity.

2. Misinterpretation.

(*e*) *Kutti* v. *Chatapan and others:* Arbuthnot, Reports of the Fonjdaree Udalut of Madras, 20.

(*f*) 3 Benth. Jud. Ev. 113.

(*g*) Foster's Cr. Law, 243; 4 Blackst. Comm. 357; 1 Greenl. Evid. § 214, 7th Ed.

(*h*) 3 Benth. Jud. Ev. 114.

(*i*) The unfortunate result of the case of Richard Coleman at the Kingston Spring Assizes of 1749, was partly, if not chiefly, owing to this cause. A woman had been brutally assaulted by three men, and died from the injuries she received. It appeared that at the

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where a man wrote to his friend, who was summoned as a juror on a trial which excited much public attention, conjuring him to convict the defendant, guilty or innocent (*k*). But equally unfounded inferences are sometimes drawn from words, supposed to be confessorial, having been used with reference to an act not identical with the subject of accusation or suspicion; as where a man who has robbed or beaten another, hearing that he has since died, utters an exclamation of regret for having illtreated him. In the case of a female accused of adultery, part of the proof was a self-disserving statement in these words, "I am very unhappy—for God's sake, hide my faults—those who know not what I suffered, will blame my conduct very much." "Am I," said Lord Stowell, commenting on this, "placed in such a situation, by this evidence, as to say that it must necessarily refer to adultery? She has been detected in imprudent visits —it might allude to them" (*l*). But of all causes of misinterpretation of the language of suspected persons, the greatest are the haste and eagerness of witnesses, and the love of the marvellous so natural to the human mind, by which they are frequently prompted to mistake expressions as well as to imagine or exaggerate facts, especially where the crime is either very atrocious or peculiar (*m*). 3. The remaining cause of error in con- 3. Incompleteness.

time of the commission of the outrage, one of the offenders called another of them by the name of Coleman, from which circumstance suspicion attached to the prisoner. Coleman, who was in a public house intoxicated, was asked by a person there with the view of ensnaring him, if he was not one of the parties concerned in that affair; to which he answered, according to one account, "Yes I was, and what then?" or according to another account, "If I was, what then?" On this and some other circumstances he was convicted and executed, but the real criminals were afterwards discovered. Two of them were executed, confessing their guilt, the third having been admitted to give evidence for the Crown. Wills, Circ. Evid. 67 & 71, 3rd Ed.

(*k*) 3 Benth. Jud. Ev. 115.

(*l*) *Williams* v. *Williams*, 1 Hagg. Cons. Rep. 304.

(*m*) See *suprà*, ch. 1, § 296; and note to *Earle* v. *Picken*, 5 C. & P.

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fessorial evidence of this nature is "Incompleteness:" i. e. where words, though not misunderstood in themselves, convey a false impression for want of some explanation, which the speaker either neglected to give, or was prevented by interruption from giving, or which has been lost to justice in consequence of the deafness or inattention of the hearers. "Ill hearing makes ill rehearsing," said our ancestors. Expressions may have been forgotten, or unheeded, in consequence of witnesses not being aware of their importance: e. g., a man suspected of larceny, acknowledges that he took the goods against the will of the owner, adding that he did so because he thought they were his own. Many a bystander, ignorant that this latter circumstance constitutes a legal defence, would remember only the first part of the statement.

Non-responsion.

§ 574. Before dismissing the subject of self-disserving evidence in criminal cases, it remains to advert to the force and effect of "Non-responsion," or silence under accusation; "Evasive responsion," and "False responsion." First then with respect to "Non-responsion." When a man is interrogated as to his having committed a crime, or when a statement that he has committed a crime is made in his presence, and he makes neither reply nor remark, the inference naturally arises that the imputation is well founded, or he would have repelled it. We have already alluded to the fallacy of the as-

542. A remarkable instance of this is presented in the case of *R.* v. *Simons*, 6 C. & P. 540. The prisoner was indicted for the then *capital* offence of having set fire to a barn; and a witness was called to prove that, as the prisoner was leaving the magistrate's room after his committal, he was overheard to say to his wife, "Keep yourself to yourself, and don't marry again." To confirm this another witness was called, who had also overheard the words, and stated them to be, "Keep yourself to yourself, and keep your own counsel:" on which Alderson, B., remarked, "One of these expressions is widely different from the other. It shews how little reliance ought to be placed on such evidence." The prisoner was acquitted.

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sumption, that silence is in all respects tantamount to confession (*n*); and however strongly such a circumstance may tell against suspected persons in general, there are many considerations against investing it with conclusive force. 1. The party, owing to deafness or other cause, may not have heard the question or observation; or, even if he has, may not have understood it as conveying an imputation upon him. 2. Supposing the accused to have heard the question or observation, and understood it as conveying an imputation upon him, his *momentary* silence may be caused by impediment of utterance, or a feeling of surprise at the imputation (*o*). 3. When this kind of evidence is in an extra-judicial form, the transaction comes to the tribunal through the testimony of witnesses, who may either have misunderstood, or who wilfully misreport it. 4. Assuming the matter correctly reported, the following observations of Bentham are certainly very pertinent and forcible. "The strength of it" (i. e. the inference of guilt from evidence like that we are now considering) "depends principally upon two circumstances: the strength of the appearances, (understand, the strength they may naturally be supposed to possess, in the point of view in which they present themselves to the party interrogated),—the strength of the appearances, and the quality of the interrogator. Suppose him a person of ripe years, armed by the law with the authority of justice, authorized (as in offences of a certain magnitude persons in general commonly are, under every system of law,) to take immediate measures for rendering the supposed delinquent forthcoming for the purposes of justice,—authorized to take such measures, and to appearance having it in contemplation so to do;—in such case, silence instead of answer to a question put to the party by such a person, may afford an inference little (if at all) weaker than that

(*n*) *Supra*, sect. 1, § 521. (*o*) Burrill, Circ. Evid. 575 & 483.

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which would be afforded by the like deportment in case of judicial interrogation before a magistrate. Suppose (on the other hand) a question put in relation to the subject, at a time distant from that in which the cause of suspicion has first manifested itself,—put at a time when no fresh incident leads to it,—put, therefore, without reflection, or in sport, by a child, from whom no such interposition can be apprehended, and to whose opinion no attention can be looked upon as due: in a case like this, the strength of the inference may vanish altogether" (*p*).

Evasive response.

§ 575. Connected with the subject of non-responsion is that of incomplete or "Evasive responsion:" i. e. where a man is interrogated as to his having committed a crime, or when a statement that he has committed a crime is made in his presence, and he either evades the question; or, while denying his guilt, refuses to shew his innocence, or to answer or explain any circumstances which are brought forward against him as criminative or suspicious. The inference of guilt from such conduct is weakened by the following additional considerations. 1. A man ever so innocent cannot always explain all the circumstances which press against him. Thus on a charge of murder, the accused declared himself unable to explain how his night-dress became stained with blood; the truth being that, unknown to him, his bed-fellow had had a bleeding wound (*q*). So a man charged with larceny could not explain how the stolen property found its way into his house or trunk, if, unknown to him, it had been deposited there by others (*r*). 2. In many cases an accused or suspected person can only explain particular circumstances, by criminating other individuals whom he is unwilling to

(*p*) 3 Benth. Jud. Ev. 92.

(*q*) See a case of this kind in Chambers' Edinburgh Journal, for March 11, 1837.

(*r*) See bk. 2, pt. 2, § 206.

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expose, or disclosing matters which, though unconnected with the charge, he is anxious to conceal. Sometimes, too, though blameless in the actual instance, he could only prove himself so by shewing that he was guilty of some other offence. 3. Where a prosecution is altogether groundless—the result of conspiracy, or likely to be supported by perjured testimony, it is often good policy on the part of its intended victim, not to disclose his defence until judicially demanded of him on his trial.

False responsion.

§ 576. "False responsion" however is a criminative fact very much stronger than either of the former. Bentham justly observes that, in justification of simple silence, the defence founded on incompetency on the part of the interrogator may be pertinent, and even convincing; but that to false responsion the application of it could scarcely extend. To the claim which the question had to notice, the accused or suspected person has himself borne sufficient testimony; so far from grudging the trouble of a true answer, be bestowed upon it the greater trouble of a lie (*s*). The infirmative hypotheses here seem to be, 1. The possibility of extra-judicial conversations having been misunderstood or misreported. 2. As innocent persons, under the influence of fear, occasionally resort to false evidence in their defence, false statements may arise from the same cause. The maxim "Omnia præsumuntur contra spoliatorem," to which that subject belongs, has been examined in a former chapter (*t*).

Legitimate use of cases of false self-criminative statements.

§ 577. While the vulgar notion, derived probably from mediæval times, when it was sanctioned by the then all powerful authority of the civilians and canonists (*u*), that confessions of guilt are necessarily true, is at vari-

(*s*) 3 Benth. Jud. Ev. 94.

(*t*) *Suprà*, ch. 2, sect. 2, sub-sect. 8.

(*u*) See *suprà*, § 554.

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ance with common sense, experience, law, and practice; still, it must never be forgotten that such confessions constitute in general proof of a very satisfactory, and, when in a judicial or plenary shape, of the most satisfactory character. Reason and the universal voice of mankind alike attest this; and the legitimate use of the unhappy cases above recorded, and others of a similar stamp, is to put tribunals on their guard against attaching undue weight to this sort of evidence. The employing them as bugbears to terrify, or the converting them into excuses for indiscriminate scepticism or incredulity, is a perversion, if not a prostitution, of the human understanding.

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Chapter VIII.

EVIDENCE REJECTED ON GROUNDS OF PUBLIC POLICY.

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Evidence rejected on grounds of public policy.

§ 578. Under this head might in strictness be classed all evidence rejected by virtue of any exclusionary rule, seeing that it is to public policy all such rules owe their existence. But the expression, "evidence rejected on grounds of public policy," is here used in a limited sense; as signifying that principle by which evidence, receivable so far as relevancy to the matters in dispute is considered, is rejected on the ground that from its reception some collateral evil would ensue to third parties or to society. One species of this has been already treated of under the head of witnesses who, as has been shewn, are privileged from answering questions having a tendency to criminate, or to expose them to penalty or forfeiture, and in some cases even merely to degrade them (*a*). But taking a general view of the subject,

(*a*) Bk. 2, pt. 1, ch. 1.

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Matters thus excluded.

the matters thus excluded on grounds of public policy may be divided into *political, judicial, professional,* and *social.*

1°. Political.

Under the first come all secrets of state: such as state papers, communications between government and its officers, and the like. A strong application is to be found in the rule, that the channels through which information reaches the ears of government must not be disclosed (*b*). When on trials for forging or uttering forged bank notes, the officers of the Bank explain to the tribunal the private marks on its true notes by which forgery is detected, the discrepancy between them and the forged notes is generally found corrected in the next issue of forged paper.

2°. Judicial.

1. Grand jurors.

§ 579. 2°. *Judicial.* The principal instance of this is in the case of jurymen. First, *grand* jurors cannot, at least in general, be questioned as to what took place among, or before them, while acting as such (*c*). In an early case on this subject (*d*) we are informed, that "the judge would not suffer a grand juryman to be produced as a witness, to swear what was given in evidence to them, because he is sworn not to reveal the secrets of his companions." "See," adds the reporter, "if a witness is questioned for a false oath to the grand jury, how it shall be proved if some of the jury be not sworn in such a case." He refers to a case of *Hitch* v. *Mallet,* where the point was raised, and adds a quære what became of it. Considering that the grand jury are the inquest of the county, whose duty is not merely to examine the bills of indictment sent before them, but to inquire into its state, and present to the Queen's justices anything they may find amiss in it, there appears reason for throwing the protection of secrecy over their deliberations. But perjury, or indeed any other offence,

(*b*) See the *Attorney-General* v. *Bryant,* 15 M. & W. 169, and the cases there referred to.

(*c*) Tayl. Ev. § 863, 4th Ed.

(*d*) Clayt. 84, pl. 140.

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committed in their presence, and afterwards made the subject of an indictment, or information, is a very different matter. Suppose a witness were to murder or assault another witness in the presence of the grand jury, would not the evidence of its members be receivable against him? Or suppose, on a dispute arising out of the business before them, one of the grand jury were to murder or assault another, is he to go unpunished? The grand juror's oath is to keep secret "the Queen's counsel, his fellows,' and his own" (*e*): it is obvious that the cases just put do not come under either of the latter heads; and, by instituting the prosecution, the crown has waived the privilege of secrecy so far as its rights are concerned (*f*).

2. Petty jurors.

§ 580. Secondly, the evidence of *petty* jurors is not receivable to prove their own misbehaviour, or that a verdict which they have delivered was given through mistake (*g*). In order to guard against misconceptions as to the findings of juries, it is the established practice of the courts not to receive a verdict, unless all the jurors by whom it is given are present and within hearing; and, after it is recorded, the officer rehearses it to them as recorded, and asks them if that is the verdict of them all. The allowing a juryman to prove the real, or pretended, misbehaviour or mistake of himself or his companions, would open a wide door to fraud and malpractice in cases where it is sought to impeach verdicts.

(*e*) 8 Ho. St. Tr. 759, 772, note. It was formerly considered treason or felony in a grand juror to disclose the king's counsel, 27 Ass. pl. 63; Bro. Abr. Corone, pl. 113.

(*f*) See 4 Christ. Blackst. Com. 126, note 4, 303, note 1, and Tayl. Ev. § 863, 4th Ed.

(*g*) *Goodman* v. *Cotherington*, 1 Sid. 235; *Norman* v. *Beamont*, Willes, 487, note; *Palmer* v. *Crowle*, Andr. 382; *Vaise* v. *Delaval*, 1 T. R. 11; *Straker* v. *Graham*, 4 M. & W. 721. The competency of jurymen as witnesses in a cause which they are trying is a wholly different question; for which see bk. 2, pt. 1, ch. 2, § 187.

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3°. Professional.

1. Communications to legal advisers.

§ 581. 3°. *Professional.* 1. At the head of these stand communications made by a party to his legal advisers, i. e. counsel, attorney, &c. (*h*): and this includes all media of communication between them; such as clerks (*i*), interpreters (*k*), or agents (*l*). But the privilege does not extend to matters of fact, which the attorney knows by any other means than confidential communication with his client, though if he had not been employed as attorney he probably would not have known them (*m*). And the privilege is not the privilege of the professional man, but of the client, who may waive it if he pleases (*n*).

2. Communications to medical men — not privileged.

§ 582. 2. Communications to a medical man, even in the strictest professional confidence, have been held not protected from disclosure (*o*),—a rule harsh in itself, of questionable policy; and at variance with the practice in France (*p*), and in some of the United States of America (*q*).

3. Communications to spiritual advisers —doubtful.

§ 583. 3. Whether communications made to spiritual advisers are, or ought to be, protected from disclosure in courts of justice presents a question of some difficulty. It is commonly thought that the decisions of the judges in the cases of *R.* v. *Gilham* (*r*) and *R.* v. *Wild* (*s*),

(*h*) *Waldron* v. *Ward*, Styl. 449; *Wilson* v. *Rastall*, 4 T. R. 753; *Foote* v. *Hayne*, Ry. & M. 165; *Taylor* v. *Foster*, 2 C. & P. 195; *Du Barré* v. *Livette*, 1 Peake, 77; *Greenough* v. *Gaskell*, 1 Myl. & K. 98; *Hibberd* v. *Knight*, 2 Exch. 11; *Cleave* v. *Jones*, 7 Exch. 421. See also Introd. pt. 2, § 53.

(*i*) *Taylor* v. *Foster*, 2 C. & P. 195.

(*k*) *Du Barré* v. *Livette*, 1 Peake, 77.

(*l*) *Parkins* v. *Hawkshaw*, 2 Stark. 239.

(*m*) *Dwyer* v. *Collins*, 7 Exch. 639, and the cases there referred to; *Brown* v. *Foster*, 1 H. & N. 736.

(*n*) Tayl. Ev. § 843, 4th Ed.

(*o*) *Duchess of Kingston's case*, 20 Ho. St. Tr. 572 *et seq.*; *R.* v. *Gibbons*, 1 C. & P. 97.

(*p*) Bonnier, Traité des Preuves, § 179.

(*q*) 1 Greenl. Ev. § 248, note (2), 7th Ed.; Appleton, Evid. App. 276.

(*r*) 1 Moo. C. C. 186.

(*s*) *Id.* 452.

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added to some others that will be cited presently, have resolved this question in the negative; and the practice is in accordance with that notion. But *R.* v. *Gilham* only shews, that a confession of guilt made by a prisoner to the world or to a magistrate, in consequence of the spiritual exhortations of a clergyman that it will be for his soul's health to do so, is receivable in evidence against him—a decision perfectly well founded, because such exhortations cannot possibly be considered "*illegal* inducements to confess." For by this expression, as shewn in a former chapter (*t*), the law means language calculated to convey to the mind of a person accused or suspected of an offence, that by acknowledging guilt he will better his position with reference to the *temporal* consequences of that offence. And the ground on which the law rejects a confession, made after such an inducement to confess, is the reasonable apprehension that, in consequence of it, the party may have made a false acknowledgment of guilt,—an argument wholly inapplicable where he is only told that, by his avowing the truth, a *spiritual* benefit will accrue to him. *R.* v. *Wild* is even less to the purpose; as the party who used the exhortation there neither was, nor professed to be, a clergyman, and, wholly unsolicited, thrust it on the prisoner. The other cases to which allusion has been made are an anonymous one in Skinner (*u*), *R.* v. *Sparkes* (*v*), *Butler* v. *Moore* (*x*), and *Wilson* v. *Rastall* (*y*). In the first the question was respecting a confidential communication to a man of law, which Lord Chief Justice Holt, as might have been expected, held privileged from disclosure; adding *obiter* that it was otherwise "in the case of a gentleman, parson, &c." The second and third are decisions, one by Buller, J.,

(*t*) *Suprà*, ch. 7, sect. 3, subsect. 2, § 551.

(*u*) Skinn. 404.

(*v*) Cited in *Du Barré* v. *Livette*, 1 Peake, 77.

(*x*) MacNally's Evid. 253.

(*y*) 4 T. R. 753.

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on circuit, and the other by the Irish Master of the Rolls, that confessions to a Protestant or Roman Catholic clergyman are not privileged; and in the fourth, the judges in banc say *obiter* that the privilege is confined to the cases of counsel, solicitor, and attorney. How far a particular form of religious belief being disfavoured by law at the period (A. D. 1802), affected the decision in *Butler* v. *Moore*, is not easy to say; but both that case and *R.* v. *Sparkes* leave the general question untouched; and on the latter case being cited to Lord Kenyon, in *Du Barré* v. *Livette* (*z*), he said, "I should have paused before I admitted the evidence there admitted." He however decided that case on the ground, that confidential communications to a legal adviser were distinguishable from others. It is also to be observed, that the subject coming incidentally before Best, C. J., in *Broad* v. *Pitt* (*a*), very shortly after *R.* v. *Gilham*, he referred to that case as deciding that the privilege in question did not apply to a clergyman; but added, "I, for one, will never compel a clergyman to disclose communications made to him by a prisoner; but, if he chooses to disclose them, I shall receive them in evidence." In a case of *R.* v. *Griffin* (*b*), tried before Alderson, B., at the Central Criminal Court, part of the evidence against the accused consisted of certain conversations between her and her spiritual adviser, the chaplain of a workhouse, relative to the transaction which formed the subject of accusation. On this evidence being offered, the judge expressed a strong opinion that it was not receivable, adding, however, "I do not lay this down as an absolute rule; but I think such evidence ought not to be given;" and the counsel for the prosecution accordingly withdrew it. The case is not fully reported, and the result is not stated. And lastly, in *R.* v. *Hay* (*c*), in an indictment for robbery of

(*z*) 1 Peake, 77.
(*a*) 3 C. & P. 518.
(*b*) 6 Cox, Cr. Cas. 219.
(*c*) 2 Fost. & F. 4.

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a watch, the watch was traced to the possession of a Roman Catholic priest, who was called as a witness for the prosecution; and who, on being asked "from whom did you receive that watch?" refused to answer, as he said he "received it in connexion with the confessional." Hill, J., ruled that he was bound to answer, on the ground that the above question did not ask him to disclose anything stated to him in the confessional; a decision apparently unimpeachable in itself, but which leaves the general question untouched.

§ 584. There cannot, we apprehend, be much doubt that, previous to the Reformation, statements made to a priest under the seal of confession were privileged from disclosure, except perhaps when the matter thus communicated amounted to high treason. In the old laws of Hen. I. (*d*) is this passage, "Caveat sacerdos ne de hiis qui ei confitentur peccata sua alicui recitet quod ei confessus est, non propinquis nec extraneis; quod si fecerit, deponatur, et omnibus diebus vite sue ignominiosus peregrinando pœniteat." The laws of Hen. I. are of course not binding per se, and are only valuable as guides to the common law; but it is otherwise with the statute Articuli Cleri (9 Edw. II.), c. 10, which is as follows (*e*). "Quandoque aliqui confugientes ad ecclesiam . . . . dum sunt in ecclesiâ custodiuntur per armatos infrà cimiterium, et quandoque infrà ecclesiam, ita arte quod non possunt exire locum sacrum causâ superflui ponderis deponendi, nec permittitur eis necessaria victui ministrari. *Responsio:* . . . . dum sunt in ecclesiâ, custodes eorum non debent morari infrà cimi-

(*d*) Leges Hen. 1, c. 5, § 17.

(*e*) The above version of the statute is taken from the valnable work entitled "Statutes of the Realm, printed by command of his Majesty, King George the Third, in pursuance of an Address of the House of Commons: From original Records and Authentic Manuscripts," A.D. 1810 *et seq.* It differs in several respects from that given by Sir Edward Coke in the 2nd Institute.

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terium, nisi necessitas vel evasionis periculum hoc requirat. Nec arcentur confugi dum sunt in ecclesia, quin possint habere vite necessaria, et exire libere pro obsceno pondere deponendo. Placet etiam Domino Regi ut latrones appellatores, quandocumque voluerint, possint sacerdotibus sua facinora confiteri; *set caveant confessores ne erronee hujusmodi appellatores informent.*" In commenting on this statute, Sir Edward Coke, writing, be it remembered, after the Reformation, expresses himself as follows(*f*):—"Latrones vel appellatores. This branch extendeth only to thieves and approvers indicted of felony, but extended not to high treasons: for if high treason be discovered to the confessor, he ought to discover it, for the danger that thereupon dependeth to the king and the whole realm; therefore this branch declareth the common law, that the privilege of confession extendeth only to felonies: And albeit, if a man indicted of felony becometh an approver, he is sworn to discover all felonies and treasons, yet he is not in degree of an approver in law, but only of the offence whereof he is indicted; and for the rest, it is for the benefit of the king, to move him to mercy: So as this branch beginneth with thieves, extendeth only to approvers of thievery or felony, and not to appeals of treason; for by the common law, a man indicted of high treason could not have the benefit of clergy (as it was holden in the king's time, when this act was made), nor any clergyman privilege of confession to conceal high treason: And so it was resolved in 7 Hen. V. (Rot. Parl. anno 7 Hen. V. nu. 13); whereupon friar John Randolph, the Queen Dowager's confessor, accused her of treason, for compassing of the death of the king: And so was it resolved in the case of Henry Garnet, (Hil. 3 Jac.), superiour of the Jesuits in England, who would have shadowed his trea-

(*f*) 2 Inst. 629.

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son under the privilege of confession, &c.; and albeit this act extendeth to felonies only, as hath been said, yet the caveat given to the confessors is observable, *ne erronice informent.*" We cite this passage to shew the common law on this subject; but it is very doubtful whether the caveat at the end of the above enactment, was inserted to warn the confessor against disclosing the secrets of the penitent *to others.* The grammatical construction and context seem to shew, that it was to prevent his abusing his privilege of access to the criminal, by conveying information to him from without; and the clause is translated accordingly in the best edition of the statutes (*g*).

§ 585. If it be an error to refuse to hold sacred the communications made to spiritual advisers, an opposite and greater error is the attempt to confine the privilege to the clergy of some particular creed. Courts of municipal law are not called on to determine the truth or merits of the religious persuasion to which a party belongs; or to inquire whether it exacts auricular confession, advises, or permits it—the sole question ought to be, whether the party who bonâ fide seeks spiritual advice should be allowed it *freely.* By a statute of New York (*h*), "No minister of the Gospel, or priest of any denomination whatsoever, shall be allowed to disclose any confessions made to him in his professional character, in the course of discipline enjoined by the rules or practice of such denomination." A similar statute exists in Missouri and some other states (*i*); and the like principle is recognized in France (*k*).

(*g*) The edition referred to in note (*e*). See also Ruffhead's edition of the Statutes, A.D. 1762.

(*h*) 1 Greenl. Evid. p. 326, § 247, note (1), 7th Ed.; Appleton, Evid. App. 275.

(*i*) 1 Greenl. Evid. p. 326, § 247, note (1), 7th Ed.; Appleton, Evid. App. 276, 277.

(*k*) Bonnier, Traité des Preuves, § 179, who adds, "Le système contraire détruirait la confiance, qui seule peut amener le repentir, en donnant au prêtre les appa-

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4°. Social. 1. Husband and wife.

§ 586. 4°. *Social.* The applications of this principle to social life are few. The principal instance is in the case of communications between husband and wife. Such, says Professor Greenleaf (*l*), "belong to the class of privileged communications, and are therefore protected, independently of the ground of interest and identity which precludes the parties from testifying for or against each other. The happiness of the married state requires that there should be the most unlimited confidence between husband and wife; and this confidence the law secures, by providing that it shall be kept for ever inviolable; that nothing shall be extracted from the bosom of the wife, which was confided there by the husband. Therefore, after the parties are separated, whether it be by divorce, or by the death of the husband, the wife is still precluded from disclosing any conversations with him; though she may be admitted to testify to facts, which came to her knowledge by means equally accessible to any person not standing in that relation." The 16 & 17 Vict. c. 83, which renders husbands and wives competent and compellable witnesses for or against each other in civil cases, contains a special enactment, sect. 3, that "No husband shall be compellable to disclose any communication made to him by his wife during the marriage, and no wife shall be compellable to disclose any communication made to her by her husband during the marriage." And the evidence of neither husband nor wife will be received, to disprove the fact of sexual intercourse having taken place between them (*m*)—a rule justly designated by Lord Mansfield as "founded in decency, morality, and

16 & 17 Vict. c. 83.

rences d'un délateur, d'autant plus odieux qu'il serait revêtu d'un caractère sacré."

(*l*) 1 Greenl. Evid. § 254, 7th Ed.

(*m*) *R.* v. *Reading*, Cas. Temp. Hardw. 79; *R.* v. *Rook*, 1 Wils. 340; *R.* v. *Luffe*, 8 East, 192; *R.* v. *Kea*, 11 *Id.* 132; *Cope* v. *Cope*, 1 Moo. & R. 269; *R.* v. *Sourton*, 5 A. & E. 180; *Wright* v. *Holdgate*, 3 Carr. & K. 158.

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policy" (*n*). But secrets disclosed in the ordinary course of business, or the confidence of friendship, are not protected (*o*).

2. Secrets of business or friendship—not protected.

§ 587. Courts of justice, as has been shewn in the Introduction to this work (*p*), possess an inherent power of rejecting evidence, which is tendered for the purpose of creating expense, or causing vexation or delay. Such malpractices are calculated to impede the administration of the law, as well as to injure the opposite party.

Rejection of evidence tendered for expense, vexation, or delay.

(*n*) *Goodwright* d. *Stevens* v. *Moss*, Cowp. 594.

(*o*) See the judgment of Lord Kenyon in *Wilson* v. *Rastoll*, 4 T. R. 758, and the cases from the State Trials there referred to.

(*p*) Introd. pt. 2, § 47.

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Chapter IX.

AUTHORITY OF RES JUDICATA.

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Maxim "Res judicata pro veritate accipitur."

§ 588. The maxim "Res judicata pro veritate accipitur" (*a*) is a branch of the more general one, "Interest reipublicæ ut sit finis litium" (*b*): and the reasons which have led to the universal recognition of both, are explained in the Introduction to this work.

Res judicata.

§ 589. "Res judicata," says the Digest (*c*), "dicitur, quæ finem controversiarum pronunciatione judicis accipit: quod vel condemnatione vel absolutione contingit." But in order to have the effect of res judicata, the decision must be that of a court of competent jurisdiction, concurrent or exclusive,—"judicium à non suo judice datum, nullius est momenti" (*d*). The decisions of

(*a*) Introd. pt. 2, § 44.
(*b*) Introd. pt. 2, §§ 41, 43.
(*c*) Dig. lib. 42, tit. 1, l. 1.
(*d*) 10 Co. 76 b.

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such tribunals are *conclusive* until reversed; but no decision is *final* unless it be pronounced by a tribunal from which there lies no appeal, or unless the parties have acquiesced in the decision, or the time limited by law for appealing has elapsed (*e*). Moreover, the conclusive effect is confined to the point actually decided; and does not extend to any matter which came collaterally in question (*f*). It does, however, extend to any matter which it was necessary to decide, and which was actually decided, as the groundwork of the decision itself, though not then directly the point at issue (*g*).

Difference between the *substantive* and *judicial* portions of a record.

§ 590. The principle in question must not be confounded either with the rule of law which requires records to be in writing (*h*), or with its conclusive presumption that they are correctly made (*i*). The mode of proving judicial acts is a different thing from the effect of those acts when proved; and the rules regulating the effect of res judicata would remain exactly as they are, if the decisions of our tribunals could be established by oral testimony (*k*). In truth, the record of a court of justice consists of two parts, which may be denominated respectively the *substantive* and *judicial* portions. In the former—the *substantive* portion—the

(*e*) 1 Ev. Poth. Part 4, ch. 3, sect. 3, art. 1.

(*f*) Per De Grey, C. J., delivering the opinion of the judges to the House of Lords in the *Duchess of Kingston's case*, 11 St. Tr. 261; 1 Rol. Ab. 876; *Blackham's case*, 1 Salk. 290—1; *R.* v. *Knaptofft*, 2 B. & C. 883; *Carter* v. *James*, 13 M. & W. 137.

(*g*) *R.* v. *Hartington Middle Quarter*, 4 E. & Bl. 780, 794.

(*h*) Bk. 2, ch. 3, sect. 1, § 218.

(*i*) *Suprà*, ch. 2, sect. 2, subsect. 3, § 348.

(*k*) The ancient laws of Wales required in general the testimony of two witnesses, but one of the exceptions to this rule was the case of a judge respecting his judgment. "If," says the Venedotian Code, bk. 2, c. 4, § 4, "one of two parties between whom a lawsuit has taken place, deny the judgment, and the other acknowledge it, the statement of the judge is in that case final respecting his judgment." See also the Dimetian Code, bk. 2, ch. 5, § 4.

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court records or attests its own proceedings and acts. To this, unerring verity is attributed by the law, which will neither allow the record to be contradicted in these respects (*l*); nor the facts, thus recorded or attested, to be proved in any other way than by production of the record itself, or by copies proved to be true in the prescribed manner (*m*).—"Nemo potest contra recordum verificare per patriam" (*n*).—"Quod per recordum probatum, non debet esse negatum" (*o*). In the *judicial* portion, on the contrary, the court expresses its judgment or opinion on the matter before it. This has only a conclusive effect between, and indeed in general is only evidence against, those who are parties or privies to the proceeding (*p*). The distinction rests on sound reason. The duty of the court is to give judgment solely according to the arguments used, and the evidence, both in chief and on cross-examination, adduced before it,—de non apparentibus et non existentibus eadem est ratio (*q*);—add to which, that in most cases the party against whom judgment is pronounced has an appeal to a superior tribunal. A judgment therefore between two persons, is not only res inter alios judicata, with respect to a third who was neither party nor privy to the proceedings; but is res inter alios acta in its most dangerous form, as being apparently attested by the authority of the administrators of the law. Bentham contends that res inter alios judicata ought to be admitted, and its weight estimated by the jury (*r*); but—without stopping to inquire, whether the cases in which it is receivable as evidence between third parties might properly be extended,—the general

(*l*) Co. Litt. 260 a; Finch, Law, 231; Gilb. Ev. 7, 4th Ed.; 4 Co. 71 a; Litt. R. 155; Hetl. 107; 1 East, 355; 2 B. & Ad. 362.

(*m*) See several instances collected, 1 Phill. Ev. 441, 10th Ed.

(*n*) 2 Inst. 380.

(*o*) Branch, Max. 186.

(*p*) 2 Smith, Lead. Cas. 661, 664 *et seq.* 5th Ed.; per De Grey, C. J., in the *Duchess of Kingston's case*, 11 St. Tr. 261; B. N. P. 231—2.

(*q*) Introd. pt. 2, § 38.

(*r*) 3 Benth. Jud. Ev. 431—2.

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principle running through our law, which requires the best evidence (*s*), and rejects all evidence where there is no reasonable and proximate connection between the principal and evidentiary facts (*t*), is quite as applicable to res judicata as to any other species of proof.

Judgments null in respect of what is contained in them.

§ 591. But the judgment of a tribunal of competent jurisdiction may be null and void in itself, in respect of what is contained in it (*u*). 1. When the object of the decision it pronounces is uncertain—"Sententia debet esse certa:"—e. g. a judgment condemning the defendant to pay the plaintiff what he owes him would be void; though it would be sufficient if it condemned the defendant to pay what the plaintiff demanded of him, and the cause of demand appeared on the record of the proceedings (*x*). 2. When the object of the adjudication is anything impossible (*y*)—"Lex non cogit impossibilia" (*z*). 3. When a judgment pronounces anything which is expressly contrary to the law, i. e. if it declares that the law ought not to be observed:—if it merely decides that the case in question does not fall within the law, though in truth it does so, the judgment is not null, it is only improper, and consequently can only be avoided by the ordinary course of appeal (*a*). 4. When a judgment contains inconsistent and contradictory dispositions (*b*). 5. When a judgment pronounces on what is not in demand (*c*).—"Judex non reddit plus, quàm quod petens ipse requirit," and "Droit ne done pluis que soit demande" (*d*).

(*s*) Bk. 1, pt. 1, §§ 87 *et seq.*, and *suprà*, § 293.

(*t*) Bk. 1, pt. 1, §§ 88, 90.

(*u*) 1 Ev. Poth. Part 4, ch. 3, sect. 3, Art. 2, § 1, N. 18. See also per Parke, B., in *R.* v. *Blakemore*, 2 Den. C. C. 420, 421.

(*x*) 1 Ev. Poth. *in loc. cit.*

(*y*) *Id.* N. 21.

(*z*) Hob. 96.

(*a*) 1 Ev. Poth. *in loc. cit.* N. 22.

(*b*) *Id.* N. 23; *Cooper* v. *Langdon*, 10 M. & W. 785.

(*c*) 1 Ev. Poth. *in loc. cit.* N. 24.

(*d*) 2 Inst. 286.

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Verdicts.

The same principles apply to other things which partake of the nature of judgments. Thus a verdict that finds matter uncertainly or ambiguously is insufficient (*e*), and the same holds when it is inconsistent (*f*). In the 11 Hen. IV. 2 A. pl. 3, on the trial of a writ of conspiracy against two, the jury found one guilty and the other not, whereupon the presiding judge (*g*) said to them, "Vous gents, vr̃e verdit est contrariant en luy m̃, car si l'un ne soit my culp̃, ambid̃ sont de rien culp̃, p̃ c̃ q̃ le br̃e supp̃ q̃ ils conspir̃ ensemble, chesō ove aut̃, mes pur ce que vous n'estes appritz de ley, soit melior aviz̃ de vr̃e verdit, &c." So if a verdict pronounces on what is not in issue (*h*). A verdict concluding against law is void (*i*); but when a jury find matter of fact and conclude against law, the verdict is good and the conclusion ill (*j*). And, lastly, of awards. It is a principle that awards must be certain (*k*); and if an award contains inconsistent provisions (*l*), or directs what is impossible (*m*), or what is illegal (*n*), it cannot be enforced by action, and will generally be set aside on motion.

Awards.

Cases where the maxim applies.

§ 592. "Cum quæritur," again to quote from the Digest (*o*), "hæc exceptio" (scil. rei judicatæ) "noceat, necne? inspiciendum est, an idem corpus sit; quantitas eadem, idem jus; et an eadem causa petendi, et eadem

(*e*) Co. Litt. 227 a.

(*f*) 48 Edw. III. 25 a; Hob. 262.

(*g*) The book says Thir. Qu. Thirning, C. J., or Thirwit, J.? Both seem to have been on the bench at that time. See Dugdale, Orig. Jud.

(*h*) 1 Leon. 67, pl. 86; Hob. 53; 1 Rol. 257.

(*i*) 22 Ass. pl. 60; 28 *Id.* pl. 4; Hob. 112–13.

(*j*) Plowd. 114; Dy. 106 b, pl. 20; 194 a, pl. 32; Jenk. Cent. I, Cas. 35; 4 Mod. 10.

(*k*) Watson, Awards, 204, 3rd Ed.; Russ. Arbitr. 275, 3rd Ed.

(*l*) *Id.* 289.

(*m*) *Id.* 288; Wats. Awards, 234, 3rd Ed.

(*n*) Russ. Arb. 391, 3rd Ed.; Wats. Awards, 234, 3rd Ed.

(*o*) Dig. lib. 44, tit. 2, ll. 12, 13, 14. See also 1 Ev. Poth. Part 4, ch. 3, sect. 3, art. 4, N. 40; Bonnier, Traité des Preuves, § 683; Code Civil, liv. 3, tit. 3, ch. 6, sect. 3.

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conditio personarum: quæ nisi omnia concurrent, alia res est." First, then, the *thing* must be the same: but this must not be understood too literally. For instance, although the flock which the plaintiff demands now, does not consist of the same sheep as it did at the time of the former demand, the demand is for the same thing, and therefore is not receivable (*p*). But, secondly, the chief matter to be attended to is, whether the *person* whom it is sought to affect by a judgment, was either party or privy to the proceedings in which it was given; in which case alone is it in general even receivable in evidence against him (*q*). It is on this principle, that a judgment against a party in a criminal case is not evidence against him in a civil suit (*r*), or vice versâ (*s*); for the parties are not the same; and the proceedings on an indictment were not evidence in appeal (*t*).

1. The *thing* must be the same.

2. The *person* must be party or privy to the judgment.

§ 593. An important exception to this rule exists in the case of judgments *in rem*, i. e. adjudications pronounced upon the *status* of some particular subject matter, by a tribunal having competent authority for that purpose (*u*). Such judgments the law has, from motives of policy and general convenience, invested with a conclusive effect against all the world. At the head of these stand judgments in the Exchequer, of condemnation of property as forfeited, adjudications of a Court of Admiralty on the subject of prize, &c. In certain instances, also, judgments as to the status or condition of a party are receivable in evidence against third persons, although

Exceptions— 1. Judgments *in rem*.

2. Other instances.

(*p*) 1 Ev. Poth. Part 4, ch. 3, sect. 3, art. 4, § 1, N. 41.

(*q*) *Suprà*, § 590.

(*r*) See Tayl. Ev. § 1505, 4th Ed.; Stark. Ev. 361, 4th Ed.; 2 Phill. Ev. 27, 10th Ed.

(*s*) Tayl. Ev. § 1505, 4th Ed.; Stark. Ev. 332, 4th Ed. "Acta facta in causâ civili non probant in judicio criminali." Masc. de Prob. Concl. 34, N. 1.

(*t*) *Samson* v. *Yardly*, 2 Keb. 223.

(*u*) 2 Smith, Lead. Cas. 662, 5th Ed.

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they are not conclusive. Thus, in an action against an executor sued on a bond of his testator, a commission finding the testator lunatic at the time of the execution of the bond, is primâ facie evidence against the plaintiff, though he was no party to it (*x*). And, by analogy to the general rule of res inter alios acta, judgments and judicial proceedings inter alios are receivable on questions of a public nature, and in other cases where the ordinary rules of evidence are departed from (*y*). Judgments not *in rem* are said to be judgments *in personam* (*z*).

3. Judgments to be conclusive must be pleaded, if there be opportunity.

§ 594. Conclusive judgments are a species of estoppels; seeing that they are given in a matter in which the person against whom they are offered as evidence has had, either really or constructively, an opportunity of being heard, and disputing the case of the other side. There is certainly this difference, that estoppels are usually founded on the voluntary act of a party; whereas it is a præsumptio juris that "judicium redditur in invitum" (*a*). Moreover, when judgment has been obtained for a debt, no other action can be maintained upon it while the judgment is in force, "quia transit in rem judicatam" (*b*). Like other estoppels by matter of record and estoppels

(*x*) *Faulder* v. *Silk*, 3 Campb. 126; *Dane* v. *Lady Kirkwall*, 3 C. & P. 683.

(*y*) *Suprà*, ch. 5, § 510.

(*z*) J. W. Smith, 2 Lead. Cases, 661, 5th Ed., suggests that *inter partes* would be better; but the classification of judgments into those *in rem*, and those *in personam*, has been recognized by statute. See 24 & 25 Vict. c. 10, s. 35.

(*a*) Co. Litt. 248 b; 5 Co. 28 b; 10 *Id.* 94 b. According to some foreign jurists, judgments partake of the nature of contracts. "Cette importante présomption (autorité de la chose jugée) se rattachant au fond du droit, autant qu'à la preuve, les règles sur l'effet des jugements, c'est à dire sur les personnes et sur les objets auxquels elle s'applique, reposent sur les mêmes bases que les règles sur l'effet des conventions. On l'a souvent dit avec raison *judiciis contrahimus:*" Bonnier, Traité des Preuves, § 680.

(*b*) Pollexf. 641. See also 6 Co. 46 a.

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by deed, judgments, in order to have a conclusive effect, must be pleaded if there be opportunity, otherwise they are only cogent evidence for the jury (*c*).

4. Judgments may be impeached for fraud.

§ 595. The general maxims of law, "Dolus et fraus nemini patrocinentur" (*d*), "Jus et fraus nunquam cohabitant" (*e*), "Qui fraudem fit frustrà agit" (*f*), apply to the decisions of tribunals (*g*). Lord Chief Justice de Grey, in delivering the answer of the judges to the House of Lords in the *Duchess of Kingston's case* (*h*), speaking of a certain sentence of a spiritual court, says; "If it was a direct and decisive sentence upon the point, and, as it stands, to be admitted as conclusive evidence upon the court, and not to be impeached from within; yet, like all other acts of the highest judicial authority, it is impeachable from without; although it is not permitted to shew that the court was *mistaken*, it may be shewn that they were *misled*. Fraud is an extrinsic collateral act which vitiates the most solemn proceedings of courts of justice." In such cases, as has been well expressed, the whole proceeding was "fabula, non judicium" (*i*). The principle applies to every species of judgment; to judgments of courts of exclusive jurisdiction (*k*); to judgments in rem (*l*); to judgments of foreign tribunals (*m*), and even to judgments

(*c*) 2 Smith, Lead. Cas. 670, 673, 5th Ed.; and *suprà*, ch. 7, sect. 2, § 544.

(*d*) 14 Hen. VIII. 8 a; 39 Hen. VI. 50, pl. 15; 1 Keb. 546.

(*e*) 10 Co. 45 a.

(*f*) 2 Rol. 17.

(*g*) 3 Co. 78 a; *The Duchess of Kingston's case*, 11 St. Tr. 262; *Brownsword* v. *Edwards*, 2 Vez. 246; *Earl of Bandon* v. *Becher*, 3 Cl. & F. 479; *Harrison* v. *The Mayor of Southampton*, 4 De G., M. & G. 148.

(*h*) 11 St. Tr. 262.

(*i*) 4 De G., M. & G. 148. See Macqueen, Law of Marriage, Divorce, and Legitimacy, 2nd Ed., p. 68.

(*k*) *Meddowcraft* v. *Hugenin*, 3 Curt. 403.

(*l*) *In re Place*, 8 Exch. 704, per Parke, B.

(*m*) *Bank of Australasia* v. *Nias*, 16 Q. B. 717.

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of the House of Lords (*n*). On an indictment for perjury, the record of the proceedings at the trial, with the finding of the jury and judgment of the court thereon in accordance with the evidence given by the accused, is no defence (*o*). It is perhaps needless to add, that a supposed judicial record offered in evidence may be shewn to be a forgery (*p*).

(*n*) *Shedden* v. *Patrick*, 1 Macq. Ho. Lo. Cas. 535.

(*o*) Hob. 201; *Titus Oates' case*, 10 Ho. St. Tr. 1136—7.

(*p*) *Noell* v. *Wells*, 1 Sid. 359.

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Chapter X.

QUANTITY OF EVIDENCE REQUIRED.

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§ 596. The last subject that offers itself to our attention in this part of the work, is the *quantity* of legitimate evidence required for judicial decision. This is governed by a rule of a negative kind, which, in times past at least, was almost peculiar to the common law of England (*a*),

General rule—No particular number of instruments of evidence required for proof or disproof.

(*a*) The Hindu law seems the reverse of ours:—where the testimony of a single witness is sufficient it is the exception, not the rule. See Translation of Pootee, c. 3, sect. 8, in Halhed's Code of Gentoo Laws.

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namely, that in general no particular number of instruments of evidence is necessary for proof or disproof,—the testimony of a single witness, relevant for proof of the issue in the judgment of the judge, and credible in that of the jury, is a sufficient basis for decision, both in civil and criminal cases (*b*). And, as a corollary from this, when there is conflicting evidence the jury must determine the degree of credit to be given to each of the witnesses; for the testimony of one witness may in many cases be more trustworthy than the opposing testimony of many (*c*). The rule has been expressed "ponderantur testes, non numerantur" (*d*); but "testimonia" or "probationes" would be better than "testes," as it is clearly not confined to verbal evidence.

Almost peculiar to the common law of England.

§ 597. We have said that this rule is a distinguishing feature in our common law system. The Mosaic law in some cases (*e*), and the civilians and canonists in all (*f*),

(*b*) 3 Blackst. Com. 370; Stark. Evid. 827, 4th Ed.; Trials per Pais, 363; Peake's Ev. 9, 5th Ed.; Co. Litt. 6 b; Fost. C. L. 233; 2 Hawk. P. C. c. 25, s. 131, and c. 46, s. 2.

(*c*) Stark. Evid. 832, 4th Ed.

(*d*) *Id.* "Testimonia ponderanda sunt, non numeranda," is found in the Scotch law authorities. Halk. Max. 174; Ersk. Inst. bk. 4, tit. 2, § 26.

(*e*) See the next note.

(*f*) Their maxim is well known, "Unius omninò testis responsio non audiatur, etiamsi præclaræ curiæ honore præfulgeat:" Cod. lib. 4, tit. 20, l. 9, § 1. See also *Id.* l. 4; Huberus, Præl. Jur. Civ. lib. 22, tit. 5, N. 18; Decretal. Gregor. IX. lib. 2, tit. 20, c. 23; and *suprà*, Introd. pt. 2, §§ 66 *et seq.* Bonnier, in his Traité des Preuves, § 201, labours hard, and apparently with success, to shew that the lawyers of ancient Rome did not establish this rule, which he considers the production of the lower empire. He argues that all the expressions to be found in the Corpus Juris Civilis of an anterior date, which seem to require a plurality of witnesses, must be understood in the sense of cautions to the judge, and not as positive rules of law. The following passage is certainly very shrewd and forcible: "Ce n'est que sous Constantin que nous voyons l'exclusion," (of the testimony of a single witness,) "nettement formulée; et encore l'empereur n'en vint il là qu'à la suite d'une première constitution, qui recommandait seulement aux juges d'être circonspects: *Simili modo sanximus*, l. 9, § 1, Cod. de testib.

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exacted the evidence of more than one witness,—a doctrine adopted by most nations of Europe, and by the ecclesiastical and some other tribunals among us. As might naturally be expected, much has been said and written, and the most opposite views have prevailed on the merits of the different systems. Those who take the civil law view contend, that it is dangerous to allow a tribunal to act on the testimony of a single witness—since by this means any person, even the most vile, can swear away the liberty, honour, or life of any one else; they insist on the undoubted truth, that the chance of discrepancy between the statements of two false witnesses, when examined apart, is a powerful protection to the party attacked; and some of them endeavour to place the matter on a jure divino foundation, by contending that the rule requiring two witnesses is laid down in scripture (*g*). Now we are by no means pre-

Arguments in favour of requiring a plurality of witnesses.

(Cod. lib. 4, tit. 20, l. 9, § 1, already cited in this note), *ut unius testimonium nemo judicum in quacunque causâ facile patiatur admitti. Et nunc manifestè sancimus, ut unius omninò testis responsio non audiatur, etiamsi præclaræ curiæ honore præfulgeat.* C'est donc au Bas Empire qu'appartient l'introduction de la maxime *testis unus testis nullus.*" The French author is not peculiar in this view; the same notion as to the origin of the rule requiring two witnesses, having been advanced long before his time. See Huberus, Præl. Jur. Civ. lib. 22, tit. 3, N. 2; and *suprà*, Introd. pt. 2, § 66.

(*g*) The civilians and canonists, Mascard. de Prob. Quæst. 5, N. 10; Decretal. Gregor. IX. lib. 2, tit. 20, cap. 23, &c.; and, there is reason to believe, our old lawyers, Fortesc. cc. 31, 32; 3 Inst. 26; Plowd. 8; argument in *R.* v. *Vaughan*, 13 Ho. St. Tr. 535; and their contemporaries; see Waterhouse, Comm. on Fortesc. pp. 402-3, and *Sir Walter Raleigh's case*, 2 Ho. St. Tr. 15; fancied that they saw in Scripture a divine command, to require the testimony of more than one witness *in all judicial proceedings.* On this, Serjeant Hawkins, 2 P. C. c. 25, s. 131, very judiciously observes, that the passages in the Old Testament which speak of requiring two witnesses, "concern only the judicial part of the Jewish law which, being framed for the particular government of the Jewish nation, doth not bind us any more than the ceremonial; and that those in the New Testament contain only prudential rules for the direction of the government of the Church, in

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Arguments against it.

pared to deny, that under a system where the decision of all questions of law and fact is entrusted to a single

matters introduced by the Gospel, and no way control the civil constitution of countries." See also 1 Greenl. Evid. § 260 a, note (3), 7th Ed. Not only is the notion of a jus divinum on such matters, untenable and absurd under a religion whose Founder declared that his kingdom is not of this world, John, xviii. 36, and disclaimed all authority as a judge or divider over men, Luke, xii. 14; but it may be questioned whether the passages cited in support of the dogma really bear it out, when considered in themselves apart from traditions and glosses. The text of the Mosaic code on this subject will be found in Numb. xxxv. 30; Deut. xvii. 6, and Deut. xix. 15; the first two of which prohibit *capital* punishment unless on the testimony of at least two witnesses, and the last directs that "one witness shall not rise up against a man for any iniquity, or for any sin, that he sinneth: at the mouth of two witnesses, or at the mouth of three witnesses, shall the matter be established." In the case also of preappointed evidence by deeds, agreements, &c., it seems to have been customary among the Jews, as among ourselves, to secure the testimony of more than one witness (see Isaiah, viii. 2; Jer. xxxii. 10—13). But nothing in the Old Testament, that we are aware of, gives the remotest intimation that two witnesses were required in *civil* cases in general; and there are some passages which seem indirectly to show the reverse. Thus when Moses speaks of civil trespasses, in Exod. xxii. 9, he says nothing about any number of witnesses: "For all manner of trespass, whether it be for ox, for ass, for sheep, for raiment, or for any manner of lost thing, which another challengeth to be his, the cause of both parties shall come before the judges; and whom the judges shall condemn, he shall pay double unto his neighbour." The Jews, like the rest of mankind, had their documentary evidence, their real evidence, and their presumptive evidence. In Dent. xxiv. 1, it is provided that a man may put away his wife by giving her a written bill of divorcement, but no mention is made of witnesses to that instrument. So of real evidence in Exod. xxii. 10—13, it is expressly provided, "if a man deliver unto his neighbour an ass, or an ox, or a sheep, or any beast, to keep; &c. And if it be stolen from him, he shall make restitution unto the owner thereof. If it be torn in pieces, then let him bring it for witness, and he shall not make good that which was torn." We also read in another place, "Now this was the manner in former time in Israel concerning redeeming and concerning changing, for to confirm all things: A man plucked off his shoe, and gave it to his neighbour: and this was a testimony in Israel." Ruth, iv. 7. And, lastly, with respect to presumptive evidence, there is one celebrated case in Jewish history which ap-

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judge, or in a country where the standard of truth among the population is very low, such a rule may be a

pears to have been decided without any witness at all. We allude to the judgment of Solomon, 1 Kings, iii. 16 *et seq.* Two women with child were delivered in a house, in which the narrative expressly states there was no one but themselves at the time. One of the children died; and both women claimed the living child, one accusing the other of having taken it from her as she slept, and put the dead child in its place. Solomon, as is well known, ascertained the truth by ordering the living child to be divided into two parts, and a part delivered to each of the women, to which the pretended mother assented; but the real mother, actuated by her maternal feelings, prayed that, sooner than the child should be slain, he might be given to her adversary.

We may here observe, that if the civilians and canonists considered the law of Moses obligatory on them in matters of *procedure*, there was a portion of it which they might have copied with advantage. By that law, every Jew, at least when his life or person was in jeopardy, was tried in the face of his countrymen at the gate of his city, and most usually by several of its elders. See Deut. xxi. 19 &c.; xxii. 15; xxv. 7; Ruth, iv. 1—11; Josh. xx. 4; Jer. xxvi. 10 &c.; Amos, v. 10—15 &c. The civilians and canonists entrusted the decision of every cause, to the judgment of a single judge, sitting in secret, acting on evidence taken in secret, and reduced to writing by a subordinate officer, with scarcely a check against misdecision, beyond a tedious and expensive appeal to a superior tribunal, similarly constituted.

The passages in the New Testament which were cited, or more properly speaking tortured, to bear out the dogma requiring a plurality of witnesses *in all cases*, are Matt. xviii. 15, 16; John, viii. 17; 2 Cor. xiii. 1; 1 Tim. v. 19; Heb. x. 28; but principally the first, respecting which the text of the Decretal runs thus: "Quia non est licitum alicui Christiano, et multò minùs crucis Christi inimico, ut causæ suæ unius tantùm quasi legitimo testimonio finem imponat: Mandamus, quatenus si inter vos et quoscunque Judæos emerserit quæstio, in qualibet causâ Christiani, et maxime clerici, non minus, quàm duorum vel trium *virorum*, qui sint probatæ vitæ et fidelis conversationis, testimonium admittatis, juxta illud Dominicum, *In ore duorum vel trium testium stat omne verbum.* Quia licèt quædam sint causæ, quæ plures, quàm duos exigant testes, nulla est tamen causa, quæ unius testimonio (quamvis legitimo) terminetur." Decretal. Gregor. IX. lib. 2, tit. 20, c. 23. See also c. 4. The passage on which so much stress is here laid is thus given in the Church of England version of the New Testament, which agrees in substance with the Vulgate, "If thy brother shall trespass against thee, go and tell him his

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valuable security against the abuse of power and the risk of perjury; but it is far otherwise where a high

fault between thee and him alone: if he shall hear thee, thou hast gained thy brother. But if he will not hear thee, then take with thee one or two more, that in the mouth of two or three witnesses every word may be established." Matt. xviii. 15, 16. Now, besides the answer already given from Serjt. Hawkins, it might be sufficient to observe on this passage, that the case put in it is clearly a case of *preappointed* evidence, the marked difference between which and *casual* evidence has been pointed out, *suprà*, Introd. pt. 1, § 31, and pt. 2, § 60; so that, even supposing the command to affect municipal law at all, the applying it to every case, civil or criminal, is an unwarrantable extension of the text. But there is another answer, more complete and satisfactory, because applicable to most of the other passages as well as to this. Assuming that the passage, "in the mouth of two or three witnesses every word may be established," is to be understood as recognizing the binding authority of the Mosaic law with respect to witnesses; the principle of that law, as already shown, was to require more than a single witness in those cases only where condemnation would be followed by very serious punishment; and it appears from the following verse of the chapter under consideration, that disobedience to the remonstrance there directed to be made, would be the foundation of further proceedings, ending in the total excommunication of the offending party. The next three passages may be explained in a similar way; as they all relate to matters where the gravest consequences would follow disobedience, after certain acts had been evidenced in the manner therein stated. In John, viii. 17, 18, our Lord shews the Jews that there are two witnesses to the divinity of his mission; in the 2 Cor. xiii. 1, the Apostle Paul, in order to justify himself in taking severe measures against some of the Corinthians for disobedience of his injunctions, (see ver. 2 and 10,) tells them that he was in a condition to prove every word of them by two or three witnesses; and in the third (1 Tim. v. 19) the same apostle lays down as a rule of ecclesiastical peace, that an accusation should not be received *against an elder* but before two or three witnesses. The remaining passage (Heb. x. 28) is little more than a historical allusion to the Mosaic law on this subject; and, so far as it goes, rather confirms the views put forward in this note, viz., "He that despised Moses' law *died* without mercy under two or three witnesses."

Before dismissing this subject, we would direct the attention of our readers to the word "virorum," in the above Decretal; which was evidently inserted to exclude the testimony of *women*, whose evidence was so much suspected by the civilians: *vide suprà*, Introd. pt. 2, § 64. It is perhaps needless to add, that none of the

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standard of truth prevails, and facts are tried by a jury directed and assisted by a judge. Add to this, that the anomaly of acting on the testimony of one person is more apparent than real; for the decision does not proceed solely on the story told by the witness, but on the moral conviction of its truth, based on its intrinsic probability and his manner of giving his evidence. And there are few cases in which the decision rests even on these circumstances alone; they are usually corroborated by the presumption arising from the absence of counter-proof or explanation, and in criminal cases by the demeanour of the accused while on his trial; for the observation of Beccaria must not be forgotten, "imperfect proofs, from which the accused might clear himself, and does not, become perfect" (*h*). Still, however, on the trial of certain accusations peculiarly liable to be made the instruments of persecution, oppression, or fraud; and in certain cases of preappointed evidence; (where parties about to do a deliberate act may fairly be required to provide themselves with any reasonable number of witnesses, in order to give facility to proof of that act;) the law may with advantage relax its general rule, and exact a higher degree of assurance than could be derived from the testimony of a single witness (*i*).

§ 598. On the other hand, however, as the requiring a plurality of witnesses clearly imposes an obstacle to the administration of justice, especially where the act to be proved is of a *casual* nature; above all where, being in violation of law, as much clandestinity as possible would

passages of Scripture which have been referred to make any such distinction. Indeed in John, viii. 17, already cited, the expression is "ἀνθρωπων," not "ἀνδρων." The notion may have had its origin in an apparently spurious law attributed to Moses by Josephus: Antiq. Judiac. lib. 4, c. 8, N. 15, for which see Introd. part 2, § 64.

(*h*) Beccaria, Dei Delitti et delle Pene, s. 7. See also, per Abbott, C. J., in *R.* v. *Burdett*, 4 B. & A. 161—2.

(*i*) See *infrà*.

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be observed, it ought not to be required without strong and just reason. Its evils are these: 1. It offers a premium to crime and dishonesty: by telling the murderer and felon that they may exercise their trade, and the knave that he may practise his fraud, with impunity, in the presence of any one person; and the unprincipled man that he may safely violate any engagement, however solemn, contracted under similar circumstances. 2. Artificial rules of this kind hold out a temptation to the subornation of perjury, in order to obtain the means of complying with them. 3. They produce a mischievous effect on the tribunal, by their natural tendency to re-act on the human mind; and they thus create a system of mechanical decision, dependent on the number of proofs, and regardless of their weight (*k*).

Origin of the rule.

§ 599. But whether the common law rule had its origin in these considerations is doubtful. Our old lawyers do not seem to have been emancipated from the civil and canon law notion, that two witnesses ought to be required in all cases, based as this notion was then supposed to be, on the authority of Scripture, and fortified by the practice of the Church (*l*). But as in those times the jury were themselves a species of witnesses, and might, if they chose to run the risk of an attaint, find a verdict without any evidence being produced before them (*m*), our ancestors considered that a judgment founded on the verdict of twelve men was a virtual compliance with, what they deemed, a divine command. One strong proof of this is, that where the trial was without a jury, namely, on a trial by witnesses, the rule of the civil and canon law was thought binding, and two witnesses were exacted (*n*).

Exceptions

§ 600. Some modern jurists, not satisfied with con-

(*k*) Introd. pt. 2, § 69.
(*l*) *Suprà*, § 597, note (*g*).
(*m*) Bk. 1, pt. 2, § 119.
(*n*) *Infrà*.

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demning the civil law for requiring at least two witnesses in all cases, attack ours for not going far enough in the opposite direction, and would abolish the exceptions to the rule which declares the testimony of one to be sufficient. At the head of these stands Bentham (*o*), whose arguments have been considered in the Introduction (*p*); but who, after all, admits, what indeed it would be difficult to deny, that requiring the second witness is, to a certain extent at least, a protection against perjury (*q*). justifiable in certain cases.

§ 601. On the whole, we trust our readers will agree with us in thinking, that any attempt to lay down a *universal* rule on this subject, which shall be applicable to all countries, ages, and causes, is ridiculous: and that, although so far as this country is concerned, the general rule of the common law,—that judicial decisions should proceed on the intelligence and credit, and not on the number of the witnesses examined or documents produced in evidence,—is a just one (*r*); there are cases where, from motives of public policy, it has been wisely ordained otherwise.

§ 602. Of the exceptions to the general rule respecting the sufficiency of one witness, some exist by the common law, but by far the greater number have been introduced by statute. Exceptions to the general rule.

§ 603. 1°. Exceptions at common law. 1. The most remarkable and important of these is in the case of prosecutions for perjury (*s*). We speak of this as an 1°. Exceptions at common law. 1. Prosecutions for perjury.

(*o*) 4 Benth. Jud. Ev. 503; 5 *Id.* 463 *et seq.*

(*p*) Pt. 2, § 53.

(*q*) 5 Benth. Jud. Ev. 468.

(*r*) An eminent French jurist of our day calls it "vérité de sens commun, qu'il faut péser les témoignages et non les compter." Bonnier, Traité des Preuves, § 198.

(*s*) 4 Blackst. Com. 358; 2 Ev. Poth. 280; 2 Stark. Ev. 859, 3rd Ed.; *R.* v. *Muscot*, 10 Mod. 192; *Fanshaw's case*, Skinn. 327; *R.* v. *Broughton*, 2 Str. 1229, 1230.

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exception established by common law, because it is generally so considered, and certainly does not appear to have been introduced by statute. But whether our law has always required the testimony of two witnesses to be given *to the judge and jury* on a charge of perjury, may be questioned, as most of our early text writers are silent on the subject (*t*). Fortescue, indeed (*u*), says, "Qui testes de perjurio convincere satagit, multò illis plures producere necesse habet," a passage transcribed without comment by Sir Edward Coke (*x*), but the context of which renders it doubtful whether, when the Chancellor wrote these words, he meant to express a legal rule. A stronger argument may be derived from the well known practice in attaint, that a jury of twelve men could only be attainted of false verdict by a jury of twenty-four. But, on the other hand, we must recollect that in early times the jury themselves were looked on as witnesses (*y*), who might convict of perjury, or, indeed, of any offence, on their own knowledge without other testimony. *R.* v. *Muscot* is the leading case on this subject (*z*). That was an indictment for perjury; and Parker, C. J., in summing up, said (*a*), "There is this difference between a prosecution for perjury, and a bare contest about property, that in the latter case the matter stands indifferent; and therefore, a credible and probable witness shall turn the scale in favour of either party; but in the former, presumption is ever to be made in favour of innocence; and the oath of the party will have a regard paid to it, until disproved. Therefore to convict a man of perjury, a probable, a credible witness is not enough; but it must be a strong and clear evidence, and more numerous than the evidence given for the defendant, for else there is only oath

(*t*) See 2 Hawk. P. C. c. 46, s. 2, and c. 25, s. 131 *et seq.*, &c.
(*u*) Fortesc. de Laud. c. 32.
(*x*) 3 Inst. 163.
(*y*) *Suprà*, bk. 1, pt. 2, § 119.
(*z*) 10 Mod. 192, Mich. 12 Ann.
(*a*) P. 194.

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against oath." Now the book called "The Modern Reports" is not of very high authority; but, even supposing the utmost accuracy in the above report, there is nothing in Chief Justice Parker's charge inconsistent with the supposition, that the above observations were made in the way of prudential advice and direction to the jury, and not with the view of laying down an imperative rule of law; and this supposition is in some degree confirmed by the comparison with which he sets out, between the proof in perjury and that in civil cases.

§ 604. The rule requiring two witnesses in indictments for perjury, applies only to the proof of the falsity of the matter sworn to by the defendant: — all preliminary or collateral matters; such as the jurisdiction and sitting of the court, the fact of the defendant having taken the oath, together with the evidence he gave, &c., may be proved in the usual way (*b*).

Reason usually assigned for this exception.

§ 605. The reason usually assigned in our books for requiring two witnesses in perjury,—viz. that the evidence of the accused having been given on oath, when nothing beyond the testimony of a single witness is produced to falsify it, there is nothing but oath against oath (*c*),—is by no means satisfactory. All oaths are not of equal value; for the credibility of the statement of a witness depends quite as much on his deportment when giving it, and the probability of his story, as on the fact of it being deposed to on oath; and, as is justly remarked by Sir W. D. Evans, the motives for falsehood in the original testimony or deposition, may be much stronger with reference to the event on the one side, than the motives for a false accusation of perjury

(*b*) Tayl. Ev. § 880, 4th Ed.; 2 Gr. Rnss. 654.

(*c*) 4 Blackst. Com. 358; Peake's Ev. 9, 5th Ed.; 3 Stark. Ev. 859, 3rd Ed.; 3 Gr. Russ. 77—78, 4th Ed.; *R.* v. *Harris*, 5 B. & A. 939, note.

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on the other (*d*). In many cases, even of the most serious kind, tribunals are compelled to decide on the relative credit of witnesses who swear in direct contradiction to each other. Where, for instance, a murder or larceny is proved by one or more witnesses, and an alibi, or other defence wholly irreconcilable with their evidence, and inconsistent with any hypothesis of mistake, is proved by a like number produced by the accused; the verdict of the jury may, virtually, though not formally, determine that one set of witnesses or the other has committed perjury.

True reason.

§ 606. The foundations of this rule, we apprehend, lie much deeper. The legislator dealing with the offence of perjury has to determine the relative weight of conflicting duties. Measured merely by its religious or moral enormity perjury, always a grievous, would in many cases be the greatest of crimes, and as such be deserving of the severest punishment which the law could inflict. But when we consider the very peculiar nature of this offence, and that every person who appears as a witness in a court of justice, is liable to be accused of it by those against whom his evidence tells,—who are frequently the basest and most unprincipled of mankind; and when we remember how powerless are the best rules of municipal law without the co-operation of society to enforce them; we shall see that the obligation of protecting witnesses from oppression, or annoyance, by charges, or threats of charges of having borne false testimony, is far paramount to that of giving even perjury its deserts. To repress that crime, prevention is better than cure: and the law of England relies, for this purpose, on the means provided for detecting and exposing the crime at the moment of commission,—such as publicity, cross-examination, the aid of a jury, &c.;—and on the infliction of a severe, though not exces-

(*d*) 2 Ev. Poth. 280.

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sive punishment, wherever the commission of the crime has been clearly proved (*e*). But in order to carry out the great objects above mentioned, our law gives witnesses the privilege of refusing to answer questions which tend to criminate, or to expose them to penalty or forfeiture (*f*); it allows no action against a witness for giving false evidence (*g*); and it throws every fence round a person accused of perjury. Besides, great precision is required in the indictment; the strictest proof is exacted of what the accused swore; and, lastly, the testimony of at least two witnesses must be forthcoming to prove its falsity. The result accordingly is that in England little difficulty, comparatively speaking, is found in obtaining voluntary evidence for the purposes of justice; and although many persons may escape the punishment awarded by law to perjury, instances of erroneous convictions for it are unknown, and the threat of an indict-

(*e*) We have not overlooked the vexata quæstio, whether the taking away life by false testimony is punishable capitally by English law; on which subject see Fost. Cr. Law, 131, 132; 19 Ho. St. Tr. 810, note; 4 Blackst. Comm. 138 and 139; and 196, with note (4) of Professor Christian. Supposing the affirmative, it could only be by an indictment, not for perjury, but for murder, with, previous to the 14 & 15 Vict. c. 100, s 4, the false oath laid as the means of death; for it is clear that no capital indictment could be framed, for bearing false witness with intent to murder, where no conviction of the innocent party ensued. And as in all cases of homicide, the death of the deceased must be clearly and unequivocally traced to the act of the accused, no such indictment for murder could be sustained if any other evidence, certainly if any other material evidence, besides that of the accused, were given on the former trial; for it would be impossible to measure the effect of his testimony on the mind of the tribunal. Indeed in most, if not in all such unhappy cases, more or less blame rests with the tribunal, in rashly giving credit to the false evidence: and of this opinion are said to have been the old Gothic lawgivers, who under such circumstances punished both the witness and the judge, and, to make all sure, the prosecutor. See 4 Blackst. Comm. 196.

(*f*) Bk. 2, pt. 1, ch. 1.

(*g*) *Henderson* v. *Broomhead*, 4 H. & N. 569; *Revis* v. *Smith*, 18 C. B. 126; *Collins* v. *Cave*, 4 H. & N. 235; affirm. on error, 6 *Id.* 131.

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ment for perjury is treated by honest and upright witnesses as a brutum fulmen.

§ 607. This view of the policy of our law is supported by the history of legislation on the subject of perjury. The law of the Twelve Tables at Rome, recognizing the impossibility of dealing with this offence according to its guilt in foro cœli, laid down, "Perjurii pœna divina, exitium; humana, dedecus" (*h*): and according to the Digest, "Qui falso vel varie testimonia dixerunt, vel utrique parti prodiderunt, à judicibus competenter puniuntur" (*i*). The legislators of the middle ages, at least in this country, took, as might be expected, the higher and more violent view of the matter; the punishment of perjury being anciently death, afterwards banishment, or cutting out the tongue, then forfeiture of goods (*k*). But experience probably shewed the folly and danger of such penalties for this offence, as its punishment was in time reduced to what is now the punishment for perjury at common law, viz. fine and imprisonment (*l*); to which, until the 6 & 7 Vict. c. 85, was added the disability to bear testimony in any legal proceeding: and, lest this should be thought too light, Sir Edward Coke observes (*m*), "Testis falsus non erit impunitus (*n*). Nocte dieque suum gestat sub pectore testem (*o*): his conscience always gnawing and vexing him." The spirit of modern legislation is in accordance. The 5 Eliz. c. 9, inflicted fine, imprisonment, and the pillory, (the latter of which was abolished by 7 Will. 4 & 1 Vict. c. 23); and the 2 Geo. 2, c. 25, s. 2, allowed a limited period of transportation; for which penal servitude for a term of years has been substituted by more recent enactments. And this is now the severest punish-

(*h*) 4 Blackst. Com. 139.
(*i*) Dig. lib. 22, tit. 5, l. 16.
(*k*) 3 Inst. 163; 4 Blackst. Com. 138.
(*l*) *Id.*
(*m*) 4 Inst. 279.
(*n*) Prov. xix. 5.
(*o*) Juvenal, Sat. 13, v. 198.

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ment that can be inflicted for perjury. The power of summarily committing false witnesses to take their trial for perjury, is vested in tribunals by some modern statutes, especially the 14 & 15 Vict. c. 100, s. 19, although a similar power existed by the common law (*p*). This is all the change that has been made in the punishment of perjury for several centuries, during which death was so frequently inflicted, both by common and statute law, for many offences falling infinitely short of it in religious and moral enormity.

Amount of evidence required from each witness, or proof.

§ 608. It is not easy to define the precise amount of evidence required from each of the witnesses, or proofs, in such cases. Indeed, as has been well observed by a very learned judge (*q*), any attempt to do so would be illusory. Mr. Starkie, in his Treatise on Evidence (*r*), informs us that *he heard* it once held by Lord Tenterden, that the contradiction of the evidence given by the accused must be given by *two direct witnesses;* and that the negative, supported by one direct witness and by circumstantial evidence, would not be sufficient: and allusion to a ruling of that sort was made by Coleridge, J., in a case before him (*s*). But this decision, if it ever took place, is most certainly not law. It is a startling thing to proclaim that if a man can eloign all direct, he may defy all circumstantial evidence, and commit perjury with impunity; and we accordingly find a contrary doctrine laid down in a variety of cases (*t*). Again, some modern authorities express themselves as though it would be sufficient, if one witness were to negative directly the matter sworn to by the defendant; and some material circumstances were proved by an-

(*p*) *Hudson's case*, Skinn. 79.

(*q*) Per Erle, C. J., *Reg.* v. *Shaw*, 10 Cox, C. C. 66, 72.

(*r*) 3 Stark. Ev. 860, n. (*q*), 3rd Ed.

(*s*) *Champney's case*, 2 Lew. C. C. 258.

(*t*) See 3 Gr. Russ. 78 *et seq.*, 4th Ed., and the cases cited *infrà*. The same was also laid down by Cresswell, J., in *R.* v. *Young*, Kent Sum. Ass. 1853, MS.

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other witness in *confirmation* or *corroboration* of his testimony (*u*). So that, according to this view, it would only be necessary to corroborate the testimony of the direct witness, in the same manner as judges are in the habit of requiring, (for the law does not require it,) the testimony of an accomplice to be corroborated; or as the testimony of a woman must be corroborated, who seeks to fix a man with the maintenance of a bastard child. When the legislature require the testimony of a suspected witness to be *corroborated*, they say so; as in the repealed statute, 4 & 5 Will. 4, c. 76, s. 72, where it is enacted, that no order in bastardy shall be made, unless the evidence of the mother of the child "shall be corroborated in some material particular by other testimony, to the satisfaction of the court:" and similar words are used in the 7 & 8 Vict. c. 101, s. 3, the 8 & 9 Vict. c. 10, s. 6, and the 32 & 33 Vict. c. 68, s. 2. When on the other hand they require the positive testimony of two witnesses to fix a party with some offence, they are equally explicit. Thus the 1 Edw. 6, c. 12, s. 22, says, that the prisoner shall "be accused by two sufficient and lawful witnesses;" the 5 & 6 Edw. 6, c. 11, s. 12, says, he "shall be accused by two lawful accusers;" the 7 & 8 Will. 3, c. 3, s. 2, says, he shall be condemned "upon the oaths and testimony of two lawful witnesses;" and the 11 & 12 Vict. c. 12, s. 4, that he shall not be condemned unless the words spoken "shall be proved by two credible witnesses." This difference in the wording of these two classes of statutes can scarcely have been accidental: and, to show that corroborating the testimony of one witness, and convicting on the evidence of two, are not synonymous expressions, take the following case. Suppose an assignment of perjury, that on the trial of A. for stealing the goods of B., the defendant

(*u*) 1 Greenl. Ev. § 257, 7th Ed. Tayl. Ev. § 876, 4th Ed.; *R.* v. *Gardiner*, 8 C. & P 739; *R.* v. *Yates*, C. & Marsh. 159.

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falsely swore that, at such a time, at C., he saw A. take and carry away those goods: and that in order to prove the falsity of this, D. and E. were called as witnesses; D. to shew that at the time mentioned in the evidence of the defendant he was at F.; and E. to shew that A. was at that time at G.; this evidence, if believed (*v*), would be sufficient to support the charge of perjury; and yet it is obvious that one of these alibis might be false and the other true,—so that the evidence of E. does not necessarily, or at least not directly, *corroborate* that of D., or vice versâ.

§ 609. It becomes, therefore, a question whether the old rule and reason of the matter are satisfied, unless the evidence of each witness has an existence and probative force of its own, independent of that of the other: so that supposing the charge were one in which the law allows condemnation on the oath of a single witness, the evidence of either would form a case proper to be left to a jury; or would at least raise a strong suspicion of the guilt of the defendant. And by analogy to this, where the evidence is,—as it undoubtedly may be by law,—wholly circumstantial, whether enough must not be proved by each witness to form a case fit to be left to the jury, if the artificial rule requiring two witnesses did not intervene; or whether it would be sufficient, if the evidence of one witness were such as to raise a *violent* presumption of guilt, and that of another a reasonable suspicion of it.—"Præsumptio violenta valet in lege" (*x*).

§ 610. To test this view of the law by the decisions and language of judges. In *R.* v. *Parker* (*y*), Tindal, C. J., says, "With regard to the crime of perjury, the

(*v*) See per Patteson, J., in *R.* v. *Roberts*, 2 Carr. & K. 614; and per Byles, J., in *R.* v. *Hook*, 1 Dearsl. & B. 606.

(*x*) Jenk. Cent. 2, Cas. 3; see Co. Litt. 6 b; and *suprà*, ch. 2, § 317.

(*y*) C. & Marsh. 646.

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law says, that where a person is charged with that offence, it is not enough to disprove what he has sworn, by the oath of one other witness; and unless there are two oaths, or there be some documentary evidence, or some admission, or some circumstances, to supply the place of a second witness, it is not enough." In *Champney's case* (*z*), Coleridge, J., said, that "one witness in perjury is not sufficient, unless supported by circumstantial evidence of the strongest kind; indeed Lord Tenterden, C. J., was of opinion, that two witnesses were necessary to a conviction;" and the reporter adds, that the doctrine of *Champney's case* was ruled by the same judge in a case of *R.* v. *Wigley*. In *R.* v. *Yates* (*a*), Coleridge, J., also said, "the rule that the testimony of a single witness is not sufficient to sustain an indictment for perjury is not a mere technical rule, but a rule founded on substantial justice; and evidence confirmatory of that one witness in some slight particulars only, is not sufficient to warrant a conviction." In *R.* v. *Gardiner* (*b*), the defendant was indicted for perjury, in falsely deposing before a magistrate that the prosecutor had had a venereal affair with a donkey, and that the defendant saw that the prosecutor had the flap of his trousers unbuttoned and hanging down, and that he saw the inside of the flap. To disprove this the prosecutor and his brother were examined. The former negatived the whole statement of the defendant; and both witnesses stated that they went to the field mentioned in the deposition; and that the prosecutor parted from the brother to see whether the donkey, which was full in foal, was able to go a certain distance; that he was absent about three minutes; and that the trousers he had on, which were produced, had no flap. On this Patteson, J., said, "I think that the corroborative evidence is quite sufficient to go to the jury." Here was an important piece

(*z*) 2 Lew. C. C. 258.
(*a*) C. & Marsh. 139.
(*b*) 8 C. & P. 737.

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of real evidence spoken to by two witnesses. In the case of *R.* v. *Roberts* (*c*), also, the same judge said, "If the false swearing be, that two persons were together at a certain time; and the assignment of perjury be, that they were not together at that time; evidence by one witness that at the time named the one was at London, and by another witness that the other was at York, would be sufficient proof of the assignment of perjury." And, lastly, in *R.* v. *Mayhew* (*d*),—where the defendant, an attorney, was indicted for perjury in an affidavit made by him in opposition to a motion to refer his bills of costs for taxation,—one witness was called to prove the perjury, and in lieu of a second it was proposed to put in the defendant's bills of costs which he had delivered. On this being objected to, Lord Denman, C. J., said, "I have quite made up my mind that the bill delivered by the defendant is sufficient evidence; or that even a letter, written by the defendant, contradicting his statement on oath, would be sufficient to make it unnecessary to have a second witness." Sir W. D. Evans tells us that he recollects having seen this principle acted on in practice in his time (*e*): though there is an old case in Siderfin to the contrary (*f*). The question as to the quantity of evidence required on a prosecution for perjury, was also fully discussed before the Court of Criminal Appeal, in a case of *R.* v. *Boulter* (*g*), which however disposed of it on the special circumstances, without laying down any general principle. And probably the soundest view of this subject is that stated by Erle, C. J., in *Reg.* v. *Shaw* (*h*), viz., that the degree of corroborative evidence requisite in such cases, must be a matter for the opinion of the tribunal which tries the case, which must see that it deserves the name of corroborative evidence.

(*c*) 2 Car. & K. 614.
(*d*) 6 C. & P. 315.
(*e*) 2 Ev. Poth. 280.
(*f*) *R.* v. *Carr*, 1 Sid. 419; Resol. 3.
(*g*) 2 Den. C. C. 396.
(*h*) 10 Cox, C. C. 66, 72.

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2. Proof of wills.

§ 611. 2. The next exception is on the proof of wills attested by more than one witness, in the manner formerly required by the Statute of Frauds, 29 Car. 2, c. 3, s. 5, and now by the 7 Will. 4 & 1 Vict. c. 26, and 15 & 16 Vict. c. 24(*i*). The practice under both these statutes is thus stated in a text book. "Where an instrument requiring attestation is subscribed by several witnesses, it is only necessary, at law, to call one of them; and the same rule prevails in Chancery, *excepting* in the case of *wills*, with respect to which it has for many years been the invariable practice of courts of equity, to require that all the witnesses who are in England, and capable of being called, should be examined. The reasons for this exception appear to be, that frauds are frequently practised upon dying men, whose hands have survived their heads,—that therefore the sanity of the testator is the great fact to which the witnesses must speak when they come to prove the attestation,—and that the heir at law has a right to demand proof of this fact, from every one of the witnesses whom the statute has placed about his ancestor. These will probably be deemed satisfactory reasons for the rule; but should the soundness of the reasons admit of any doubt, the inflexibility of the rule admits of none; and it applies in full force, even to issues which are directed by a court of equity to be tried by a jury. On such occasions, it is usual to say that all the subscribing witnesses must be called, in order to satisfy the conscience of the Lord Chancellor" (*k*).

3. Trial by witnesses.

§ 612. 3. Another exception to this rule was in the "Trial by witnesses," or, as our old lawyers expressed it, "Trial by proofs"(*l*),—expressions used in our books

(*i*) See bk. 2, pt. 3, ch. 1, § 222.

(*k*) Tayl. Ev. § 1652, 4th Ed. See also 2 Ph. Evid. 463, 10th Ed.; *Bowman* v. *Bowman*, 2 M. & Rob. 501; *M'Gregor* v. *Topham*, 3 Ho. Lo. Cas. 132.

(*l*) The existence of this exception to the general rule of evi

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to designate a few cases which were tried by the judges instead of a jury. It is not easy to fix precisely what

dence having been doubted, and even denied, we propose in this note to lay before our readers the arguments and authorities on the subject. Most of the modern treatises on evidence make no mention of the exception; and in some of the earlier editions of Mr. Phillipps' work (see 7th Ed., A.D. 1829), *Shotter* v. *Friend*, Carth. 142, is cited as a ground for its rejection, where Lord Chief Justice Holt is reported to have said, p. 144, although the case did not turn on the point now under consideration, "it was not necessary in any case at *common law*, that a proof of matter of fact should be made by more than one witness; for a single testimony of one credible witness was sufficient to prove any fact; and the authorities cited in 1 Inst. 6 b, did not warrant that opinion, which was there founded on them." In the report of the same case in 1 Shower, 158, 172, by the name of *Shatter et ux.* v. *Friend*, the Lord Chief Justice is mentioned as citing, in support of his position, F. N. B. 97, and 23 or 33 Hen. VI. 8 (probably meant for 33 Hen. VI. 8, pl. 23); but on the other hand, Eyres, J., is represented as saying (p. 161), that "where trial is not by jury but *per testes*, there must be two in all cases:" so that the dicta in that case go far to neutralize each other. A third report is to be found in Holt, 752, which, both in the name and substance of the case, agrees with that in Carthew. The authorities cited by the Lord Chief Justice, at the utmost only show that two witnesses were not required to prove the summons of the tenant in a real action, if indeed they go so far; but they certainly do not in any degree touch the general question; and his attack on those cited in the 1 Inst. seems founded on what is either wrong reference or misprint. That passage (Co. Litt. 6 b) runs thus, "It is to be known, that when a trial is by witnesses, regularly the affirmative ought to be proved by two or three witnesses, as to prove the summons of the tenant, or the challenge of a juror and the like. But when the trial is by verdict of twelve men, there the judgment is not given upon witnesses or other kind of evidence, but upon the verdict; and upon such evidence as is given to the jury, they give their verdict." For this, in, we believe, all the editions of Coke upon Littleton, certainly both in that of 1633 and the last one of 1832, are cited Mirror, c. 3; Plowd. 10; Bract. lib. 5, fol. 400. Now the last two of these are wholly irrelevant; and were most probably inserted by mistake for Plowd. 8 and Bract. lib. 5, fol. 354 b, which are cited by Sir Edw. Coke in 3 Inst. 26, when speaking of two witnesses in cases of treason, and are certainly some authority in his favour; and his remaining quotation, the Mirror, c. 3 (see sect. 12), expressly states it to be a good exception of summons, that the party "was not summoned, or not reasonably summoned, or that he re-

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these cases were. About one, indeed, there can be no question, viz. where on a writ of dower the tenant pleaded that the husband of the demandant was still living (*m*); and Finch (*n*), relying on the obiter dictum

ceived the summons by no freeman, or but by one freeman."

Many other authorities might be cited to establish the position, that two witnesses are required on a trial by witnesses; and what is more important, they generally agree in the reason for this, namely, the absence of a jury. Thus Lord Chief Baron Gilbert says, "There are some cases in the law where the full evidence of two witnesses is absolutely necessary; and that is, first, where the trial is by witnesses only, as in the case of a summons in a real action: for one man's affirming is but equal to another's denying, and where there is no jury to discern of the credibility of witnesses, there can be no distinction made in the credibility of their evidence; for the court doth not determine of the preference in credibility of one man to another, for that must be left to the determination of the neighbourhood; therefore where a summons is not made and proved by two witnesses, the defendant may wage his law of non summons, &c." Gilb. Ev. 151, 4th Ed. The authority of Coke has been already referred to, and in another part of the 1st Inst. (viz. 158 b) he tells us, that the proof of the summons of the jurors to try an assize must be made by two summoners at the least; for which he cites Mirr. c. 2, s. 19, Bract. lib. 5, fol. 333, 334, Fleta, lib. 6, c. 6, and Britt. c. 121. The first of these is irrelevant, and probably a mistake for Mirr. c. 3, s. 12, already mentioned; the other three are all to the effect that there must be two summoners. In *Reniger* v. *Fogassa*, H. 4 Edw. VI., Plowd. 12, Brooke, Recorder of London, says, arguendo, "It is true that there ought to be two witnesses at least, where the matter is to be tried by witnesses only, as matters are in the civil law." So in 2 Ro. Abr. 675, Evidence, pl. 5, "Un testimoigne est bone, per *Atkins*, et *Hoke* dit doit estre 2 al meins, ou est trie per testimoignez." See also Trials per Pais, 363.

The general opinions of the middle ages render the existence of the exception in question extremely probable. Our old lawyers were by no means emancipated from the notion, the grounds of which we have examined *suprà*, § 597, and note (*g*) there, that the divine law required two witnesses in every case, and that human legislation should be in accordance with it: see in particular, Plowd. 8; Fortescue, cc. 31 & 32; and 3 Inst. 26: but they considered this rule complied with when the issue was determined by a jury, who in early times were a sort of witnesses themselves; see bk. 1, pt. 2, § 119.

(*m*) 3 Blackst. Comm. 336; Finch, Law, 423; 8 Hen. VI. 23, pl. 7; 56 Hen. III., cited 2 Rol. Abr. 578, pl. 14.

(*n*) Finch, *in loc. cit.*

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of the court in 8 Hen. VI. 23, pl. 7, says that it was the *only* case in which trial by witnesses was allowed. But other authorities mention several more; e. g. the summons of a tenant in a real action (*o*); the summons of a juror in an assize (*p*), and the challenge of a juror (*q*); and two viewers are said to have been required in an action of waste (*r*). Mr. Justice Blackstone endeavours to reconcile this discrepancy, by supposing that the plea of the life of the husband in a writ of dower, was the only case in which the direct issue in the cause was tried by witnesses, all the other instances being of collateral matters (*s*). But it is not quite clear that in ancient times, issue taken on the death of the husband in a cui in vitâ (*t*), and in some other cases (*u*), was not tried by witnesses; and with respect to the action of dower, although modern authorities speak of the above plea as a plea in bar (*x*), some of the old authorities treat it as a dilatory plea (*y*). Real and mixed actions are now abolished by 3 & 4 Will. 4, c. 27, s. 36, and 23 & 24 Vict. c. 126, s. 26; but it may be a question whether two witnesses are not still required when, in an action for dower brought in the form given by the latter act, the death of the husband is disputed.

§ 613. The evidence on this kind of trial need not be direct—it is sufficient if the witnesses speak to circumstances, giving rise to a reasonable intendment or pre-

(*o*) Co. Litt. 6 h; Gilb. Ev. 151, 4th Ed.

(*p*) Co. Litt. 158 b.

(*q*) Co. Litt. 6 b. This probably means an objection to the sufficiency of the summons of a juror in a real action; see 2 Hawk. P. C. c. 25, s. 131. Certain it is that no such rule is observed in modern practice when a juror is challenged.

(*r*) Clayt. 89, pl. 150.

(*s*) 3 Blackst. Comm. 336.

(*t*) 2 Edw. II. 24, tit. Cui in Vitâ.

(*u*) See 36 Ass. pl. 6; 39 *Id.* pl. 9; 30 *Id.* pl. 26; 43 Ass. pl. 26.

(*x*) Com. Dig. Pleader, 2 Y. 9; 2 Wms. Saund. 44 d, 6th Ed.

(*y*) Bract. lib. 4, c. 7, fol. 301, 302; Dyer, 185 a, pl. 65.

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sumption of the truth of the fact which they are called to prove (*z*).

4. Claims of villenage or niefty.

§ 614. 4. There seems to be some difference among the authorities as to whether two witnesses were required on a claim of villenage or niefty (*a*). If such were the rule, it was a good one in favorem libertatis; but it is needless to pursue the inquiry at the present day.

2°. Exceptions created by statute. First. Trials for treason and misprision of treason.

§ 615. We now proceed to the statutory exceptions. Of these the most important and remarkable is found in the practice on trials for high treason and misprision of treason. The better opinion and weight of authority are strongly in favour of the position, that at the common law a single witness was sufficient in high treason, and à fortiori in petty treason or misprision of treason (*b*). In the 3 Inst. 26, however, Sir Edward Coke says, "It seemeth that by the ancient common law, one accuser or witness was not sufficient to convict any person of high treason. * * * And that two witnesses be required, appeareth by our books," (here he cites several authorities, all of which relate to the two witnesses required on a trial by witnesses (*c*), and having no reference to treason or criminal proceedings,) "and I remember no authority in our books to the contrary: and the common law herein is grounded upon the law of God, expressed both in the Old and New Testament; Deut. xvii. 6, xix. 15; Matt. xviii. 16; John, xviii. 23 (perhaps meant for John, viii. 17); 2 Cor. xiii. 1; Heb. x. 28;

(*z*) *Thorne* v. *Rolff*, Dyer, 185 a, pl. 65; 1 Anders. 20, pl. 42.

(*a*) See Britton, c. 31; 2 Rol. Abr. 675, Evidence, pl. 3; F. N. B. 78, H.; and Fitz. Abr. Villenage, pl. 39.

(*b*) 2 Hawk. P. C. c. 25, s. 131, and c. 46, s. 2; Foster, Cr. Law, 233; 1 Greenl. Ev. § 255, 7th Ed.; Taylor, Ev. § 869, 4th Ed.; *The Case of Clipping*, T. Jones, 263; Bro. Abr. Coronc, pl. 219; Dyer, 132, pl. 75; Kel. 18 and 49; 1 Hale, P. C. 297—301, 324; 2 *Id.* 286, 287.

(*c*) See *supra*, § 612 and note (*l*) there.

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'In ore duorum aut trium testium peribit qui interficietur; Nemo occidatur uno contra se dicente testimonium.'" Now supposing these and similar passages of Scripture to be applicable to municipal law at all (*d*), a decisive answer to Sir Edw. Coke is given by Serjeant Hawkins (*e*), viz. that his argument proves too much; for that "whatsoever may be said either from reason or Scripture for the necessity of two witnesses in treason, holds as strongly in other capital causes, and yet it is not pretended that there is, or ever was, any such necessity in relation to any other crime but treason." Besides, the authority of some parts of the 3rd Institute has been doubted (*f*). Perhaps the hypothesis offered in a former part of this chapter, respecting the origin of the rule requiring two witnesses in perjury, may assist us here also, viz. that our old lawyers considered two witnesses necessary on all criminal charges, including treason; but deemed this requisite complied with when the trial was by jury, who, in those days, were looked on as witnesses (*g*).

§ 616. Taking for granted then that, at common law, a charge of treason might be maintained on the testimony of a single witness, the statutes on the subject are as follow. The 1 Edw. 6, c. 12, after repealing several statutes by which various treasons and felonies were created, enacts, in its 22nd section, that no person shall be indicted, arraigned, condemned or convicted for treason, petit treason, misprision of treason, &c., unless he shall be accused by two sufficient and lawful witnesses, or shall willingly without violence confess the same. And by the 5 & 6 Edw. 6, c. 11, s. 12, no person shall be indicted, arraigned, condemned, convicted or attainted for any treason, &c. unless he shall be accused by two lawful

(*d*) See on this subject *suprà*, § 597 and note (*g*) there.
(*e*) 2 Hawk. P. C. c. 25, s. 131.
(*f*) Kely. 49.
(*g*) *Suprà*, § 603.

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accusers; which said accusers at the time of the arraignment of the party accused, if they be then living, shall be brought in person before him, and avow and maintain what they have to say against him, &c.; unless he shall willingly without violence confess the same. But the subsequent statute, 1 & 2 P. & M. c. 10, s. 7, having directed that all trials for treason should be had and used only according to the due order and course of the common law, and not otherwise, the judges of those days doubted, or affected to doubt, whether the above-mentioned statutes of Edw. VI. were not repealed. The question was raised in several cases, and the doubt finally overruled in the time of Charles II. (*h*).

§ 617. Several other points were raised on the construction of those statutes, which are now interesting only as matter of legal history (*i*); for the modern law on this subject is contained in the statute 7 & 8 Will. 3, c. 3, "For regulating of Trials in Cases of Treason and Misprision of Treason." The second section of that statute enacts, "that no person shall be indicted, tried, or attainted, of high treason, whereby any corruption of blood may or shall be made to any such offender, &c., or of misprision of such treason, but by and upon the oaths and testimony of two lawful witnesses, either both of them to the same overt act, or one of them to one, and the other of them to another overt act of the same treason; unless the party indicted, and arraigned, or tried, shall willingly without violence, in open court, confess the same, or shall stand mute, or refuse to plead."

Reasons for this alteration in the common law.

§ 618. Various reasons have been suggested for this alteration of the common law. At the trial of Viscount Stafford (*j*), in 1680, before the House of Lords, Lord

(*h*) Fost. C. L. 237.
(*i*) See Fost. C. L. 232—240.
(*j*) T. Raym. 407, 408.

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Chancellor Finch, we are informed, "was pleased to communicate a notion concerning the reason of two witnesses in treason, which he said was not very familiar he believed; and it was this, anciently all or most of the judges were churchmen and ecclesiastical persons, and by the canon law, now and then in use over all the Christian world, none can be condemned of heresy but by two lawful and credible witnesses; and bare words may make a heretick, but not a traitor, and anciently heresy was treason; and from thence the parliament thought fit to appoint, that two witnesses ought to be for proof of high treason." This explanation certainly receives some colour from one of the statutes repealed by the 1 Edw. 6, c. 12, namely, the 25 Hen. 8, c. 14, s. 6, which enacted that no person should be presented or indicted of heresy, unless duly accused and detected thereof by two lawful witnesses at the least. But heresy being an ecclesiastical offence, it was reasonable to adopt the ecclesiastical rules of proof when it was made the subject of secular punishment; besides, it is an offence of a character which would justify the throwing almost any amount of protection round persons accused of it. Others consider the rule based on this—that, the accused having taken an oath of allegiance, where a single witness bears testimony to treason committed by him, there is only oath against oath (*k*). But this reasoning is far from satisfactory; for the accused may never have taken an oath of allegiance, and even if he has, all oaths are not observed with equal fidelity. Besides, the 1 Edw. 6, c. 12, extends the rule to cases of *petty* treason, and to the speaking of certain words rendered punishable under that act by imprisonment and forfeiture of goods. The true reason for requiring two witnesses in high treason and misprision of treason—unquestionably that which influenced the framers of the modern

(*k*) 4 Blackst. Comm. 358.

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statutes on the subject, whatever may have been the motives of those of the earlier ones—is the peculiar nature of these offences, and the facility with which prosecutions for them may be converted into engines of abuse and oppression (*l*). For although treason, when clearly proved, is a crime of the deepest dye, and deservedly visited with the severest punishment, yet it is one so difficult to define—the line between treasonable conduct and justifiable resistance to the encroachments of power, or even the abuse of constitutional liberty, is often so indistinct—the position of the accused is so perilous—struggling against the whole power and formidable prerogatives of the crown—that it is the imperative duty of every free state to guard, with the most scrupulous jealousy, against the possibility of such prosecutions being made the means of ruining political opponents (*m*). With this view the 7 & 8 Will. 3, c. 3, besides requiring two witnesses as already stated, enacts, inter alia, that no person shall be tried for any of the treasons therein mentioned, except attempts to assassinate the king, unless the indictment be found within three years after the offence committed (*n*); that the accused shall have a copy of the indictment five days before the trial (*o*), and a copy of the jury panel two days before the trial (*p*). And by the 7 Anne, c. 21, s. 11 (in part repealed and re-enacted by 6 Geo. 4, c. 50), a copy of the indictment, a list of the witnesses to be produced, and of the jurors impanelled, are to be delivered to him a certain time before the trial, &c. All these protections have been taken away by subsequent statutes, from certain cases of treason and misprision of treason, which, though within the letter, are certainly not within the spirit of the former enactments, viz., where the overt acts of treason charged in the indict-

(*l*) 4 Blackst. Comm. 358; Gilb. Ev. 152, 4th Ed.

(*m*) Gilb. Ev. 152, 4th Ed.

(*n*) 7 & 8 Will. 3, c. 3, s. 6.

(*o*) *Id.* sect. 1.

(*p*) *Id.* sect. 7.

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ment are the assassination of the sovereign, or any direct attempt against his life or person (*q*).

§ 619. The principle of the 7 & 8 Will. 3, c. 3, requiring two witnesses in treason, has however been severely attacked. Bishop Burnet, speaking of that statute shortly after it was passed, said the design of it seemed to be to make men as safe in all treasonable conspiracies and practices as possible (*r*); but he afterwards makes some observations which it would be difficult to reconcile with this language (*s*). Bentham, as might be expected, strongly condemns it (*t*); but his chief arguments are directed against the portions now repealed by the 39 & 40 Geo. 3, c. 93, and the 5 & 6 Vict. c. 51 (*u*). He observes, however, that after the passing of this statute, "a minister might correspond (as so many ministers were then actually corresponding) with the exiled king by single emissaries, and be safe. * * * * As to the other provisions, then, all of them have their merit, some of them were no more than the removal of barefaced injustice; but as to this, it was specially levelled, not against false accusations, but against true ones" (*x*). In Taylor on Evidence also (*y*) we find this passage: "a man of calm reflection may think that the legislature would confer no trifling benefit on the country, if it defined the law of treason with greater accuracy, and if, by abolishing alike the cruelties which make it abhorrent, and the protections which make it ridiculous, it rendered the punishment of traitors more certain and less barbarous." All this reasoning, however, is more specious than sound. Objections to it. Fallacy of them.

(*q*) 39 & 40 Geo. 3, c. 93, and 5 & 6 Vict. c. 51.

(*r*) Fost. C. L. 221; 5 Benth. Jud. Ev. 489.

(*s*) Fost. *in loc. cit.* The passages referred to will be found in Burnet's History of his own Times, vol. 2, p. 141, Ed. 1734.

(*t*) 5 Benth. Jud. Ev. 485—495.

(*u*) See *suprà*, § 618, and *infrà*, bk. 4, pt. 1, ch. 2.

(*x*) 5 Benth. Jud. Ev. 490.

(*y*) Tayl. Ev. § 871, 5th Ed.

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It seems based, in some degree at least, on the false principle that has been examined in the Introduction to this work (*z*), and which is to be found more or less in every part of Bentham's Treatise on Judicial Evidence, viz., that the indiscreet passiveness of the law is as great an evil as its corrupt or misdirected action; and consequently, that the erroneous conviction and punishment of an innocent, a violent, or even a seditious man, for the offence of treason, works the same amount of mischief as the escape of a traitor from justice, and no more. Besides, the above authors appear to have assumed, that in the case put of ministers corresponding with attainted persons by means of a single emissary, and such like, the incapacity to prosecute for *treason* involves impunity to the criminal. They forget that there has always been such an offence as *seditious conduct*, which, being only a misdemeanor, may be proved by one witness, and which does not merge in the treason (*a*). And of late years the legislature has created an intermediate offence between treason and sedition, by making various acts against the crown and government of the country felony, and severely punishable (*b*). By the law as it stands, persons sometimes escape with a conviction for felony or sedition whose conduct, considered with technical accuracy, amounts to treason; but on the other hand, those who are innocent of that terrible crime lie under no dread of being falsely accused of it; and when a conviction for treason does take place, it is on such unquestionable proof, that the blow descends on the disaffected portion of society with a moral weight, increased a hundredfold by the moderation of the executive in less aggravated cases. The extending the protection to charges of *petty* treason, as was done by 1 Edw. 6, c. 12, was idle; the 7 & 8 Will. 3, c. 3, it will be observed, avoided that; and

(*z*) Introd. pt. 2, § 49.

(*a*) 4 Blackst. Com. 119; *R.* v. *Reading*, 7 Ho. St. Tr. 265—7.

(*b*) 11 & 12 Vict. c. 12.

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the offence itself is now abolished by 9 Geo. 4, c. 31, s. 2.

Two witnesses not requisite to prove collateral matters.

§ 620. The rule requiring two witnesses in treason, only applies to the proof of the overt acts of treason charged in the indictment—any collateral matters may be proved as at common law (*c*); such as that the accused is a subject of the British crown (*d*), and the like. Nor perhaps does it hold on the trial of collateral issues; as for instance, where a prisoner convicted of treason makes his escape, and, on being retaken and brought up to receive judgment, denies his identity with the party mentioned in the record of conviction (*e*).

2. Other statutory exceptions.

§ 621. There are other statutory exceptions to the rule in question. By the 7 & 8 Vict. c. 101, s. 3, and 8 & 9 Vict. c. 10, s. 6, already referred to (*f*), no order of affiliation shall be made against the putative father of a bastard child, unless the evidence of its mother be corroborated in some material particular by other testimony, to the satisfaction of the court; and the repealed enactment, 4 & 5 Will. 4, c. 76, s. 72, contained a similar provision. So by the 32 & 33 Vict. c. 68, s. 2, which makes the parties to actions for breach of promise of marriage competent to give evidence therein, it is provided that no plaintiff in such action shall recover a verdict, unless his or her testimony shall be corroborated by some other material evidence in support of such promise. And another instance will be found in the 11 & 12 Vict. c. 12, s. 4, which enacts that no person shall be convicted of certain offences made felony by that statute, "in so far as the same are

(*c*) Tayl. Ev. § 872, 4th Ed.; Fost. C. L. 240—2; 1 East, P. C. 130.

(*d*) Fost. C. L. 240; *R.* v. *Vaughan*, 13 Ho. St. Tr. 535, per Holt, C. J.

(*e*) In such cases the prisoner has no peremptory challenge. *Ratcliffe's case*, Fost. C. L. 42.

(*f*) *Suprà*, § 608.

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expressed, uttered, or declared by open or advised speaking, except upon his own confession in open court, or unless the words so spoken shall be proved by two credible witnesses." Seventy-four statutes of this kind are said to have been passed, between the 1 Edw. VI. (A.D. 1547) and the 31 Geo. III. (A.D. 1791) (*g*).

When two witnesses, &c. are required, their credit is to be determined by the jury.

§ 622. Although, as has been shewn in the present chapter, the law of this country requires a certain numerical amount of proofs in particular cases, it has avoided the great mistake into which the civilians fell, of attaching to those proofs an artificial weight, and leaves their value to the discrimination of a jury. From motives of legal policy no decision shall in such cases be based on the testimony of a single witness, however credible; but when more are adduced, be the number what it may, their testimony must, if untrustworthy in the eyes of the jury, go for nothing.

(*g*) 5 Benth. Jud. Ev. 483.

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BOOK IV.

FORENSIC PRACTICE AND EXAMINATION OF WITNESSES.

PART I.

FORENSIC PRACTICE OF COMMON LAW COURTS WITH RESPECT TO EVIDENCE.

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Rules which regulate forensic practice respecting evidence.

§ 623. THE rules of evidence, especially such as relate to evidence in causâ, are *rules of law*, which a court or judge has no more right to disregard or suspend, than any other part of the common or statute law of the land (*a*). Those which regulate forensic practice are less inflexible: for, although the mode of receiving and extracting evidence is governed by established rules, a discretionary power of relaxing them on proper occasions is vested in the tribunal; and indeed it is obvious, that an unbending adherence under all circumstances to rules which are the mere *forma et figura judicii*, would impede rather than advance the ends of justice. The most convenient way of treating the present subject will be, first to describe the course of a trial, and then to examine the practice relative to its principal incidents as connected with the matter before us. But before doing either of these, it is advisable to direct attention to certain proceedings previous to trial.

Division.

(*a*) Bk. 1, pt. 1, §§ 80, 81, 86, and pt. 2, § 116.

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Chapter I.

PROCEEDINGS PREVIOUS TO TRIAL.

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1. Inspection of documents in the custody or under the control of the opposite party.

§ 624. 1. The common law laid down as a maxim, "Nemo tenetur armare adversarium suum contrà se" (*a*); in furtherance of which principle, it generally allowed litigant parties to conceal from each other, up to the time of trial, the evidence on which they meant to rely, and would not compel either of them to supply the other with any evidence, parol or otherwise, to assist him in the conduct of his cause (*b*). The maxim, at least when pushed to this extent, was certainly not stamped with the wisdom which, for the most part, marks the common law (*c*); but the defect was in some degree remedied by the power of filing a bill in equity for the discovery

At common law.

(*a*) Co. Litt. 36 a; Wing. Max. 665.

(*b*) See per Holt, C. J., 3 Salk. 363.

(*c*) The maxim seems to have been derived from the Roman law. Cod. lib. 2, tit. 1, l. 4. So in the Scotch law, "Nemo tenetur edere instrumenta contra se." Halk. M. 100; Ersk. Inst. book 4, tit. 1, § 52.

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of evidence,—a process however alike circuitous and expensive. In modern times the courts of common law took upon themselves to relax considerably the strictness of the ancient rule; and at length it became the established practice, that when a document in which both litigant parties had a joint interest, was in the custody or control of one of them, under such circumstances that he might fairly be deemed trustee of it for both, the court would order an inspection and copy of it to be given to his adversary, if it were material to his suit or defence (*d*). Even this, however, fell far short of the requirements of justice; and the legislature at length interfered, in the 14 & 15 Vict. c. 99, by which the powers of the common law courts in this respect were considerably extended. By the 6th section it is enacted, "Whenever any action or other legal proceeding shall henceforth be pending in any of the superior courts of common law at Westminster or Dublin, or the Court of Common Pleas for the county palatine of Lancaster, or the Court of Pleas for the county of Durham, such court and each of the judges thereof may respectively, on application made for such purpose by either of the litigants, compel the opposite party to allow the party making the application, to inspect all documents in the custody or under the control of such opposite party relating to such action or other legal proceeding, and, if necessary, to take examined copies of the same, or to procure the same to be duly stamped, in all cases in which previous to the passing of this act a discovery might have been obtained by filing a bill, or by any other proceeding in a court of equity at the instance of the party so making applica-

14 & 15 Vict. c. 99, s. 6.

(*d*) *Charnock* v. *Lumley*, 5 Scott, 438; *Steadman* v. *Arden*, 15 M. & W. 587; *Goodliff* v. *Fuller*, 14 *Id.* 4; *Smith* v. *Winter*, 3 *Id.* 309; *Ley* v. *Barlow*, 1 Exch. 800; *The Metropolitan Saloon Omnibus Company* v. *Hawkins*, 4 H. & N. 146; *Shadwell* v. *Shadwell*, 6 C. B., N. S. 679; *Priee* v. *Harrison*, 8 C. B., N. S. 617.

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tion as aforesaid to the said court or judge." In the construction of this statute it has been held, First. In accordance with the general rule respecting statutes having only affirmative words, it has not taken away the common law; and consequently, in every case in which a party could have obtained inspection before the statute, he may obtain it still, without reference to the statute at all (*e*). Secondly. The power conferred on the courts of common law by this statute, to compel an inspection of documents, which the party applying can satisfy the court or judge are in the possession or under the control of the opposite party, can only be exercised in cases where such an inspection could be obtained by bill of discovery, or other proceeding in a court of equity. It does not enable them to compel a discovery whether certain documents, or whether any and what documents, relating to the cause, are in his possession or power (*f*).

2. Discovery, &c. of documents in the possession or power of the opposite party. 17 & 18 Vict. c. 125, s. 50.

§ 625. 2. But far greater powers were conferred on the courts by the 17 & 18 Vict. c. 125, s. 50, which enacts as follows:—"Upon the application of either party to any cause or other civil proceeding in any of the superior courts, upon an affidavit by such party of his belief that any document, to the production of which he is entitled for the purpose of discovery or otherwise, is in the possession or power of the opposite party, it shall be lawful for the court or judge to order that the party against whom such application is made, or if such party is a body corporate, that some officer to be named of such body corporate, shall answer on affidavit, stating what documents he or they has or have in his or their possession or power relating to the matters

(*e*) *Bluck* v. *Gompertz*, 7 Exch. 67; *Sneider* v. *Mangino*, 7 Exch. 229; *Doe* d. *Child* v. *Roe*, 1 E. & B. 279; *Doe* d. *Avery* v. *Langford*, 1 B. C. C. 37; *Shadwell* v. *Shadwell*, 6 C. B., N. S. 679.

(*f*) *Hunt* v. *Hewitt*, 7 Exch. 236; *Rayner* v. *Allhusen*, 2 L., M. & P. 05; *Galsworthy* v. *Norman*, 21 L. J., Q. B. 70; *Scott* v. *Walker*, 2 E. & B. 555.

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in dispute, or what he knows as to the custody they or any of them are in, and whether he or they objects or object (and if so, on what grounds,) to the production of such as are in his or their possession or power; and upon such affidavit being made the court or judge may make such further order thereon as shall be just." But inspection under this enactment will be granted, only when it is applied for in a *bonâ fide* action; and it will therefore be refused when the court sees that the action has been brought, not to obtain redress from the defendant, but, by means of an application for inspection, to get at evidence to be used in other proceedings against a third party (*g*). Again, in granting inspection under this enactment, the court will follow the rule of courts of equity on a bill of discovery, namely, to refuse every application which is merely of a fishing nature (*h*). But it has been held to be no answer to an application under this section, that the documents are such as the party is privileged from producing; for if such is the fact, it may be shown in the affidavit to be made in obedience to the rule directing inspection (*i*).

3. Inspection of real or personal property.

§ 625A. 3. By sect. 58 of the same statute it is enacted, that either party to an action "shall be at liberty to apply to the court or a judge, for a rule or order for the inspection by the jury or by himself or by his witnesses, of any real or personal property, the inspection whereof may be material to the proper determination of the question in dispute." And it has been held that this section gives, as ancillary to the power to order inspection, the same power to order the removal of obstructions, with a view to inspection, as is exercised by courts of equity in like cases (*j*).

(*g*) *Temperley* v. *Willett*, 6 E. & B. 380.

(*h*) *Gomm* v. *Parrott*, 3 C. B., N. S. 47; *Wright* v. *Morrey*, 11 Exch. 209; *Shadwell* v. *Shadwell*, 6 C. B., N. S. 679.

(*i*) *Forshaw* v. *Lewis*, 10 Exch. 712.

(*j*) *Bennett* v. *Griffiths*, 3 E. & E. 467.

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4. Inspection in the Court of Admiralty.

§ 625B. 4. Similar powers to those mentioned in the last two sections, are conferred on the Court of Admiralty, by the 24 Vict. c. 10, ss. 17 and 18.

5. Inspection under patent law.
15 & 16 Vict. c. 83, s. 42.

§ 626. 5. By the Patent Law Amendment Act, 15 & 16 Vict. c. 83, s. 42, it is enacted, that "in any action in any of her Majesty's superior courts of record at Westminster and in Dublin for the infringement of letters patent, it shall be lawful for the court in which such action is pending, if the court be then sitting, or if the court be not sitting then for a judge of such court, on the application of the plaintiff or defendant respectively, to make such order for an injunction, inspection, or account, and to give such direction respecting such action, injunction, inspection, and account, and the proceedings therein respectively, as to such court or judge may seem fit." The "inspection," authorized by this section, is an inspection of the instrument or machinery manufactured or used by the parties, with a view to procuring evidence of infringement (*j*). And it has been made a question whether the power of the court to grant such inspection, is limited to granting an external inspection, or extends to enabling it to order a portion of the inspected article to be given up for analysis (*k*).

6. Exhibiting interrogatories to a party in the cause.
17 & 18 Vict. c. 125, ss. 51—57.

§ 627. 6. But in providing for the compulsory discovery of evidence from litigant parties before trial, the 17 & 18 Vict. c. 125 has not only supplied deficiences in the 14 & 15 Vict. c. 99, but introduced some entirely new machinery into the common law system of evidence and forensic procedure. The following are the sections of that statute bearing on this matter:

"Sect. 51. In all causes in any of the superior courts, by order of the court or a judge, the plaintiff may, with the declaration, and the defendant may, with the plea,

(*j*) *Vidi* v. *Smith*, 3 E. & B. 969, 974.

(*k*) *The Patent Type Founding Company* v. *Lloyd*, 5 H. & N. 192.

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or either of them by leave of the court or a judge may, at any other time, deliver to the opposite party or his attorney (provided such party, if not a body corporate, would be liable to be called and examined as a witness upon such matter) interrogatories in writing upon any matter as to which discovery may be sought, and require such party, or in the case of a body corporate any of the officers of such body corporate, within ten days to answer the questions in writing by affidavit, to be sworn and filed in the ordinary way; and any party or officer omitting, without just cause, sufficiently to answer all questions as to which a discovery may be sought within the above time, or such extended time as the court or a judge shall allow, shall be deemed to have committed a contempt of the court, and shall be liable to be proceeded against accordingly.

"Sect. 52. The application for such order shall be made upon an affidavit of the party proposing to interrogate, and his attorney or agent, or, in the case of a body corporate, of their attorney or agent, stating that the deponents or deponent believe or believes that the party proposing to interrogate, whether plaintiff or defendant, will derive material benefit in the cause from the discovery which he seeks, that there is a good cause of action or defence upon the merits, and, if the application be made on the part of the defendant, that the discovery is not sought for the purpose of delay; provided that where it shall happen, from unavoidable circumstances, that the plaintiff or defendant cannot join in such affidavit, the court or judge may, if they or he think fit, upon affidavit of such circumstances by which the party is prevented from so joining therein, allow and order that the interrogatories may be delivered without such affidavit.

"Sect. 53. In case of omission, without just cause, to answer sufficiently such written interrogatories, it shall be lawful for the court or a judge, at their or his

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discretion, to direct an oral examination of the interrogated party, as to such points as they or he may direct, before a judge or master; and the court or judge may by such rule or order, or any subsequent rule or order, command the attendance of such party or parties before the person appointed to take such examination, for the purpose of being orally examined as aforesaid, or the production of any writings or other documents to be mentioned in such rule or order, and may impose therein such terms as to such examination, and the costs of the application, and of the proceedings thereon, and otherwise, as to such court or judge shall seem just."

Sect. 54. Such rule or order shall have the same force and effect, and may be proceeded upon in like manner, as an order made under the 1 Will. 4, c. 22.

" Sect. 55. Whenever, by virtue of this act, an examination of any witness or witnesses has been taken before a judge of one of the said superior courts, or before a master, the depositions taken down by such examiner shall be returned to and kept in the master's office of the court in which the proceedings are pending; and office copies of such depositions may be given out, and the depositions may be otherwise used" in the same manner as in the case of depositions taken under the 1 Will. 4, c. 22.

" Sect. 56. It shall be lawful for every judge or master named in any such rule or order as aforesaid for taking examinations under this act, and he is hereby required to make, if need be, a special report to the court in which such proceedings are pending, touching such examination, and the conduct or absence of any witness or other person thereon or relating thereto; and the court is hereby authorized to institute such proceedings and make such order and orders upon such report as justice may require, and as may be instituted and made in any case of contempt of the court.

" Sect. 57. The costs of every application for any

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rule or order to be made for the examination of witnesses by virtue of this act, and of the rule or order and proceedings thereon, shall be in the discretion of the court or judge by whom such rule or order is made."

§ 628. In carrying out the provisions of this enactment, the courts hold a tight hand; as otherwise it might be made a mere matter of course, to deliver interrogatories with the declaration and plea respectively in every case, thus needlessly adding to the expense of legal proceedings (*l*). And there are several decisions to show that, in allowing interrogatories, the court will adhere to the established principles of evidence. Thus, interrogatories must be put within a reasonable range (*m*), and must not be made the means of evading the rule which requires the production of primary evidence (*n*). So the party to whom they are administered possesses the privilege of other witnesses (*o*); and consequently he will not be compelled to state the contents of, or describe documents which are his muniments of title (*p*); nor, except under special circumstances, to answer questions tending to criminate him, or expose him to penalty or forfeiture (*q*). Lastly, in proceeding under this statute the courts follow, in general, the principles established in courts of equity (*r*); and therefore they will only allow interrogatories the object of which is to obtain

(*l*) *Martin* v. *Hemming*, 10 Exch. 484; 18 Jurist, 1004, per Parke, B.; *Smith* v. *The Great Western Railway Company*, 2 Jurist, N. S. 668, 669, per Lord Campbell.

(*m*) *Robson* v. *Crawley*, 2 H. & N. 766.

(*n*) *Herschfeld* v. *Clark*, 11 Exch. 712; *Moor* v. *Roberts*, 2 C. B., N. S. 671; *Wolverhampton Railway Company* v. *Hawksford*, 5 C. B., N. S. 703.

(*o*) Bk. 2, pt. 1, ch. 1, § 126 *et seq.*

(*p*) *Adams* v. *Lloyd*, 3 H. & N. 351.

(*q*) See *Tupling* v. *Ward*, 6 H. & N. 749; *Edmunds* v. *Greenwood*, L. Rep., 4 C. P. 70; *Villeboisnet* v. *Tobin*, *Id.* 184; *Atkinson* v. *Fosbroke*, L. Rep., 1 Q. B. 628; *May* v. *Hawkins*, 11 Exch. 210.

(*r*) *Pye* v. *Butterfield*, 5 B. & S. 829.

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evidence to support the case of the party exhibiting them, and will refuse such as are merely fishing, or directed to finding out the case of the opposite party (*s*).

20 & 21 Vict. c. 85.

§ 629. Before dismissing this subject, we would remark that the 20 & 21 Vict. c. 85,—which establishes the Court for Divorce and Matrimonial Causes, and directs (*t*) that the rules of evidence observed in the superior courts of common law at Westminster shall be applicable to, and observed in, the trial of all questions of fact in that court,—contains provisions for the interrogation of the parties to the suit in certain cases (*u*).

7. Admission of formal documents before trial.

§ 630. 7. The expense of proving documents which are formal in their nature, and not likely to be made the subject of dispute, was long felt to be a grievance. For remedy whereof, the R. G. H. 4 Will. 4, rule 20 (Practice) (*x*), directs that "either party, after plea pleaded, and a reasonable time before trial, may give notice to the other, either in town or country (in the form hereto annexed, or to the like effect) of his intention to adduce in evidence certain written or printed documents; and unless the adverse party shall consent, by indorsement on such notice, within forty-eight hours, to make the admission specified, the party requiring such admission may call on the party required, by summons, to show cause before a judge why he should not consent to such admission, or, in case of refusal, be subject to pay the costs of proof; and unless the party required shall expressly consent to make such admission, the judge shall, if he think the application reasonable, make an order, that the costs of proving any document specified

(*s*) *Thöl* v. *Lcask*, 10 Exch. 704; *Horton* v. *Bott*, 2 H. & N. 249; *Riccard* v. *The Inclosure Commissioners*, 4 E. & B. 329; *Whateley* v. *Crowter*, 5 E. & B. 709; *Edwards* v. *Wakefield*, 6 E. & B. 462; *Moor* v. *Roberts*, 2 C. B., N. S. 671.

(*t*) Sect. 48.

(*u*) Sects. 43, 46.

(*x*) Jervis's Rules, 110—11, 4th Ed.

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in the notice, which shall be proved at the trial to the satisfaction of the judge or other presiding officer, certified by his indorsement thereon, shall be paid by the party so required, whatever may be the result of the cause. Provided, that if the judge shall think the application unreasonable, he shall indorse the summons accordingly. Provided also, that the judge may give such time for inquiry or examination of the documents intended to be offered in evidence, and give such directions for inspection and examination, and impose such terms upon the party requiring the admission, as he shall think fit. If the party required shall consent to the admission, the judge shall order the same to be made. No costs of proving any written or printed document shall be allowed to any party who shall have adduced the same in evidence on any trial, unless he shall have given such notice as aforesaid, and the adverse party shall have refused or neglected to make such admission, or the judge shall have indorsed upon the summons that he does not think it reasonable to require it. A judge may make such order as he may think fit respecting the costs of the application, and the costs of the production and inspection, and in the absence of a special order the same shall be costs in the cause."

And the Common Law Procedure Act, 1852—15 & 16 Vict. c. 76, enacts as follows with respect to the admission of documents:

"Sect. 117. Either party may call on the other party by notice to admit any document, saving all just exceptions; and in case of refusal or neglect to admit, the cost of proving the document shall be paid by the party so neglecting or refusing, whatever the result of the cause may be, unless at the trial the judge shall certify that the refusal to admit was reasonable; and no costs of proving any document shall be allowed unless such notice be given, except in cases where the omission to

15 & 16 Vict. c. 76, s. 117.

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give the notice is in the opinion of the master a saving of expense.

" Sect. 118. An affidavit of the attorney in the cause, or his clerk, of the due signature of any admissions made in pursuance of such notice, and annexed to the affidavit, shall be in all cases sufficient evidence of such admissions.

" Sect. 119. An affidavit of the attorney in the cause, or his clerk, of the service of any notice to produce, in respect of which notice to admit shall have been given, and of the time when it was served, with a copy of such notice to produce annexed to such affidavit, shall be sufficient evidence of the service of the original of such notice, and of the time when it was served."

Under this statute certain rules were framed by the judges, which came into operation on the 1st day of H. T. (January 11th), 1853; one of which, the 29th, is as follows:

" The form of notice to admit documents referred to in the Common Law Procedure Act, 1852, s. 117, may be as follows:

In the Q. B.
C. P. } *A. B.* v. *C. D.*
or Exchequer.

Take notice, that the { plaintiff / defendant } in this cause proposes to adduce in evidence the several documents hereunder specified, and that the same may be inspected by the { defendant / plaintiff } his attorney or agent, at ——, on ——, between the hours of ——; and the { defendant / plaintiff } is hereby required, within forty-eight hours from the last-mentioned hour, to admit that such of the said documents as are specified to be originals were respectively written, signed, or executed, as they purport respectively to have been; that such as are specified as

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copies are true copies; and such documents as are stated to have been served, sent, or delivered, were so served, sent, or delivered respectively, saving all just exceptions to the admissibility of all such documents as evidence in this cause. Dated, &c.

G. H., attorney
[*or* "agent"] for { plaintiff / defendant. }

To E. F., attorney
[*or* "agent"] for { defendant / plaintiff. }

The rule then gives a form for describing the documents. And by rule 30 "In all cases of trials, writs of inquiry, or inquisitions of any kind, either party may call on the other party, by notice, to admit documents in the manner provided by, and subject to, the provisions of the Common Law Procedure Act, 1852; and in case of the refusal or neglect to admit after such notice given, the costs of proving the document shall be paid by the party so neglecting or refusing, whatever the result of the cause may be; unless at the trial or inquisition, the judge or presiding officer shall certify that the refusal to admit was reasonable; and no costs of proving any document shall be allowed unless such notice be given, except in cases where the omission to give the notice is, in the opinion of the master, a saving of expense." And by R. G. Mich. Vac. 1854, rule 1, "The provisions as to pleadings and practice contained in the Common Law Procedure Act, 1852" (15 & 16 Vict. c. 76), "and the rules of practice of the superior courts of common law made the 11th January, 1853, and also the rules of pleading which came into operation on the first day of Trinity Term, 1853, so far as the same are, or may be made, applicable, shall extend and apply to all proceedings to be had or taken under the Common Law Procedure Act 1854" (17 & 18 Vict. c. 125).

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Chapter II.

TRIAL AND ITS INCIDENTS.

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§ 631. I. HAVING in the first Book explained the nature of our common law tribunal for the trial of facts, and the respective functions of judge and jury (*a*), the course of a trial is soon described. The proceedings commence with a short statement to the jury of the questions they are about to try. In civil cases this is made by the plaintiff if he appears in person, by his counsel if he appears by counsel, and by his junior counsel if he has more than one; and is technically termed "opening the pleadings." In criminal cases a summary of the charge against the accused, together with his plea thereto, and the issue joined, is stated to the jury by the officer of the court, and in some cases (*b*) by the counsel for the prosecution. On this the judge decides which of the contending parties ought to begin; and he then, either by himself or his counsel, states his case to the jury, and afterwards adduces his evidence in support of it. In criminal cases, where no counsel is employed for the prosecution, the prosecutor cannot address the jury, and the evidence is gone into at once; for in contemplation of law the suit is that of the sovereign (*c*). The opposite party is then heard in like order. If he adduces evidence the opener has a right to address the jury in reply; but in prosecutions where the Attorney-General

1. Course of a trial.

(*a*) Bk. 1, pt. 1, §§ 82, *et seq.*
(*b*) I. e., in misdemeanors.
(*c*) Bk. 2, pt. 1, ch. 2, §§ 169, 183.

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appears officially he, or his representative, has a right to reply whether evidence is adduced or not (*d*): and this extends to proceedings in the Exchequer for penalties. In addressing the jury, a party has no right to state facts which he does not intend to adduce evidence to prove (*e*); and when this rule is violated the judge may, in his discretion, allow a reply (*f*). Where a fresh case, i. e. a case not merely answering the case of the party who began, is set up by the responding party, and evidence is adduced to support such fresh case, the party who began may adduce proof of a rebutting case; his adversary has then a special reply on the new evidence thus adduced, and the opener a general reply on the whole case. By 17 & 18 Vict. c. 125, s. 18, "Upon the trial of any cause the addresses to the jury shall be regulated as follows: the party who begins, or his counsel, shall be allowed, in the event of his opponent not announcing at the close of the case of the party who begins his intention to adduce evidence, to address the jury a second time at the close of such case, for the purpose of summing up the evidence; and the party on the other side, or his counsel, shall be allowed to open the case, and also to sum up the evidence (if any); and the right to reply shall be the same as at present:" and 28 & 29 Vict. c. 18, s. 2, enacts, "If any prisoner or prisoners, defendant or defendants, shall be defended by counsel, but not otherwise, it shall be the duty of the presiding judge, at the close of the case for the prosecution, to ask the counsel for each prisoner or defendant so defended by counsel, whether he or they intend to adduce evidence, and in the event of none of them thereupon

17 & 18 Vict. c. 125, s. 18.

28 & 29 Vict. c. 18, s. 2.

(*d*) Resolutions of the judges, 7 C. & P. 676, Res. 5; *R.* v. *Horne*, 20 Ho. St. Tr. 660—664; *R.* v. *Radcliffe*, 1 W. Bl. 3; *R.* v. *Marsden*, 1 Mood. & M. 439.

(*e*) Bk. 1, pt. 1, § 94, and *infrà*.

(*f*) *Crerar* v. *Sodo*, 1 Mood. & M. 85; *Faith* v. *M'Intyre*, 7 C. & P. 44. The notion that this may be claimed as a *right* cannot be supported.

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announcing his attention to adduce evidence, the counsel for the prosecution shall be allowed to address the jury a second time in support of his case, for the purpose of summing up the evidence against such prisoner or prisoners, or defendant or defendants; and upon every trial for felony or misdemeanor, whether the prisoners or defendants, or any of them, shall be defended by counsel or not, each and every such prisoner or defendant, or his or their counsel respectively, shall be allowed, if he or they shall think fit, to open his or their case or cases respectively; and after the conclusion of such opening or of all such openings, if more than one, such prisoner or prisoners, or defendant or defendants, or their counsel, shall be entitled to examine such witnesses as he or they may think fit, and when all the evidence is concluded to sum up the evidence respectively; and the right of reply, and practice and course of proceedings, save as hereby altered, shall be as at present." The party against whom real or documentary evidence is used has a right to inspect it, and if no valid objection to it appears, it will be read to the jury by the officer of the court. Every witness called is first examined by the party calling him, and this is denominated his "examination in chief." If an objection is made to his competency, he is interrogated as to the necessary facts, and this is called examination on the *voir dire*(*g*). The party against whom any witness is examined has a right to "cross-examine" him: after which the party by whom he is called may "re-examine" him, but only as to matters arising out of the cross-examination. The court and jury may also put questions to the witnesses, and inspect all media of proof adduced by either side. The court, generally speaking, is not only not bound by the rules of practice relative to the manner of questioning witnesses, and the order of receiving proofs, but

(*g*) Bk. 2, pt. 1, ch. 2, § 133, and Bk. 2, pt. 2, ch. 3, § 490.

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may in its discretion dispense with them in favour of parties or counsel. During the whole course of the trial the judge determines all questions of law and practice which arise; and if the admissibility of a piece of evidence depends on any disputed fact, the judge must determine it, and for this purpose go into proofs, if necessary (*h*).

Counsel in criminal cases. Ancient practice.

§ 632. The common law right of a party to appear by counsel, when that right is accorded to the other side, was long subject to a remarkable exception, i. e. in cases of persons indicted or impeached for treason or felony. It was otherwise on prosecutions for misdemeanor (*i*); as also on appeals of felony (*j*): and, even on indictments or impeachments for treason or felony, the exception was confined to cases where the accused pleaded the general issue, and did not extend to preliminary or collateral matters; such as pleas to the jurisdiction (*k*), pleas of sanctuary (*l*), or of autrefois acquit (*m*), the trial of error in fact to reverse outlawry (*n*), issues on identity when brought up to receive judgment (*o*), &c. And even on the trial of the general issue, if a point of law arose which the court considered doubtful, they assigned the accused counsel to argue it on his behalf (*p*). For the refusal of counsel to accused persons in these cases, the most serious and important which can come before a court of justice, several reasons are assigned in our old books. 1. That in criminal proceedings at the suit of the crown, the

(*h*) Bk. 1, pt. 1, § 82.

(*i*) 6 Ho. St. Tr. 797.

(*j*) Dr. & Stud. Dial. 2, ch. 48; 9 Edw. IV. 2 A, pl. 4; 8 Ho. St. Tr. 726; Staundf. Pl. Cor. lib. 2, c. 63.

(*k*) 11 Ho. St. Tr. 523–526.

(*l*) *Humphrey Stafford's case*, 1 Hen. VII. 26 A.

(*m*) 41 Ass. pl. 9.

(*n*) *Burgesses case*, Cro. Car. 365.

(*o*) *Ratcliffe's case*, Fost. Cr. Law, 40; 18 Ho. St. Tr. 434.

(*p*) 9 Edw. IV. 2 A, pl. 4; 1 Hen. VII. 26 A.; Staundf. Pl. Cor. lib. 2, c. 63; 2 Hawk. P. C. 401.

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accused does not need the protection of counsel, seeing that it cannot be intended that the crown is actuated by malice against him; whereas in appeals great malice on the part of the appellant must be intended, and consequently counsel ought to be allowed to the accused (*q*). But although it is perfectly true that no malice against the accused can be intended in the crown, it is going a great way to extend so strong a presumption to its officers; who might also, even without any evil intention, and through mere error in judgment, pervert both its immense prerogatives and their own abilities and legal acquirements, to procuring the condemnation of innocent persons. Besides, the argument proves too much; for, if sound, the rule ought to have extended to cases of misdemeanor. 2. That trial of the general issue is a trial not of matter of law, but of matter of fact, the truth of which must be better known to the accused than to his counsel (*r*): an argument which also manifestly proves too much—for if worth anything it is applicable to every cause, civil and criminal, unless where a point of law is expressly raised by demurrer or other proceeding where the facts are taken for granted. 3. That the accused ought not to be convicted unless his guilt is so manifest that defence by any counsel, however able, would be hopeless (*s*). One would naturally suppose that a defence which is hopeless must be harmless to the opposite side. 4. That if counsel were allowed in such cases they would raise trivial objections, and so the proceedings go on ad infinitum (*t*): an argument at direct variance with the ancient maxim of law, "De morte hominis nulla est cunctatio longa" (*u*). The best answer to it however is that since counsel have been allowed in treason and felony no such consequence has

(*q*) Dr. & Stud. Dial. 2, ch. 48.
(*r*) Staundf. Pl. Cor. lib. 2, c. 63; Finch, Law, 386.
(*s*) 3 Inst. 29 and 137.
(*t*) 11 Ho. St. Tr. 525; Staundf. Pl. Cor. lib. 2, c. 63.
(*u*) Co. Litt. 134 b.

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followed. 5. That counsel are unnecessary, it being the duty of the court to be counsel for the prisoner (*v*): a wretched misapplication of a noble constitutional maxim, namely, that if an accused person has no counsel, it is the duty of the court to see that he does not suffer for want of counsel: i. e. to give him the benefit of any point of law in his favour, though through ignorance he cannot himself take advantage of it; to see that he is not oppressed by the legal ingenuity of the opposing advocates; and generally, to secure him a fair trial (*x*). But it is not possible, and would be indecorous if it were, for the court to act as counsel in the ordinary sense of the term, for an accused or any other party—in other words, to combine the incompatible functions of judge and advocate. Besides, although counsel were always allowed in cases of misdemeanor, we are not aware that when a person accused of a misdemeanor is undefended by counsel, the court is exonerated from the duty of seeing that he is convicted according to law. 6. That if the party defends himself, his conscience will perhaps sting him to utter the truth, or at least his gesture or countenance shew some signs of it; and if they do not, still his speech may be so simple that the truth shall be thereby discovered sooner than by the artificial speech of learned men (*y*). When a prisoner's conscience stings him to utter the truth, the natural course for him is to plead guilty, and not reserve the disburdening of it for the jury; and, for one man who in a case of anything like difficulty has sufficient sense and nerve to defend himself with clearness and effect, twenty would injure even a good cause by their ignorance and confusion.

(*v*) 3 Inst. 29 and 137; Dr. & Stud. Dial. 2, ch. 48.

(*x*) That this is the true meaning of the maxim that the judge is the prisoner's counsel, see 5 Ho. St. Tr. 466, note; 6 *Id.* 516, note.

(*y*) Staundf. Pl. Cor. lib. 2, c. 63; Finch, Law, 386; 2 Hawk. P. C. 400.

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§ 633. It is not worth while to discuss the origin of this practice—whether it formed part of the ancient common law, or, like many other abuses, crept in gradually (*z*). We certainly find the practice clearly stated as above so early as the reign of Edward the Fourth (*a*); and from thence down to the alteration of the law after the Revolution of 1688, the prayer of the prisoner to be allowed to be defended by counsel, and the refusal of it by the court, formed the regular prologue to a state trial (*b*). At that period a heavy blow was aimed at the established practice by the stat. 7 & 8 Will. 3, c. 3, which after reciting that "nothing is more just and reasonable than that persons prosecuted for high treason and misprision of treason, whereby the liberties, lives, honour, estates, blood, and posterity of the subjects, may be lost and destroyed, should be justly and equally tried, and that persons accused as offenders therein should not be debarred of all just and equal means for defence of their innocencies in such cases;" enacts that every person so accused and indicted, arraigned, or tried for any treason, whereby any corruption of blood may ensue, &c., or misprision of such treason, shall be received and admitted to make their full defence by counsel learned in the law. A like law was extended to parliamentary impeachments by 20 Geo. 2, c. 30. And by 39 & 40 Geo. 3, c. 93, and 5 & 6 Vict. c. 51, s. 1, treasons where the overt act charged is the actual assassination of the sovereign, or other offence against his person, are to be tried in every respect as if the accused stood charged with murder.

Alterations in more recent times.

7 & 8 Will. 3, c. 3.

20 Geo. 2, c. 30. 39 & 40 Geo. 3, c. 93. 5 & 6 Vict. c. 51, s. 1.

§ 634. Although the 7 & 8 Will. 3, c. 3, did not

Modern practice in felony.

(*z*) Vide Mirrour of Justices, chap. 3, sect. 1; and Dr. & Stud. Dial. 2, ch. 48.

(*a*) 9 Edw. IV. 2, pl. 4. See also per Gascoigne, C. J., 7 Hen. IV. 35 b, pl. 4.

(*b*) See the State Trials passim. Several of these cases are collected, 5 Ho. St. Tr. 466 *et seq.* (note).

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extend to cases of felony, yet a practice gradually grew up during the last century, which continued until the reign of William the Fourth; by which the counsel for a prisoner were allowed to advise him during his trial; to take points of law in his favour; to examine and cross-examine witnesses on his behalf; and, in short, to do everything except address the jury in his defence. But by the 6 & 7 Will. 4, c. 114, the whole anomaly was removed. That statute, after reciting that "it is just and reasonable that persons accused of offences against the law should be enabled to make their full answer and defence to all that is alleged against them," enacts in its first section that "all persons tried for felonies shall be admitted, after the close of the case for the prosecution, to make full answer and defence thereto, by counsel learned in the law, or by attorney in courts where attornies practise as counsel."

6 & 7 Will. 4, c. 114.

§ 635. In construing this statute several judges ruled that, when an accused person defends himself he may state in his defence what facts he thinks proper, and although he adduces no evidence to prove them the jury may weigh the credit due to his statement; but that counsel who defend prisoners are bound by the rule of practice in civil cases, viz. only to state such facts as they are in a condition to establish by evidence (*c*). According to this dogma, when a prisoner's defence rests, as it often necessarily must rest, on an explanation of apparently criminating circumstances, his employing counsel causes his defence to be suppressed—a state of things hardly contemplated by the framers of the statute, and certainly at variance with the principles of natural justice. It is sought to defend this anomalous proceeding on the ground, that the counsel for the accused may put his client's defence before the jury in

(*c*) *R.* v. *Beard*, 8 C. & P. 142; *R.* v. *Butcher*, 2 M. & Rob. 229; *R.* v. *Burrows*, *Id.* 124.

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a hypothetical form:—but how feebly does this tell in comparison with a straightforward explanation! Some judges have sought to qualify the rule by allowing the accused to make a statement of the facts he deems essential, leaving it to be commented on by his counsel; but this course has not been followed by other judges, and the practice on the subject cannot be considered settled (*d*). It is worthy of observation that in cases of treason the prisoner is not only allowed, but invited by the court, to address the jury after his counsel have spoken for him (*e*).

2. Principal incidents of a trial.

1. Ordering witnesses out of court.

§ 636. II. Proceeding to the second part of our subject: the first incident connected with a trial requiring particular notice is the practice of ordering witnesses out of court. When concert or collusion among witnesses is suspected, or there is reason to apprehend that any of them will be influenced by the statements of counsel or the evidence given by other witnesses, the ends of justice require that they be examined apart; and the court will proprio motu, or on the application of either party, order all the witnesses, except the one under examination, to leave court. This practice is probably coeval with judicature. "Si necessitas exegerit," says Fortescue (*f*), "dividantur testes, donec ipsi deposuerint quicquid velint, ita quod dictum unius non docebit, aut concitabit eorum alium ad consimiliter testificandum." The better opinion, however, seems to be that this is not demandable *ex debito justitiæ* (*g*); and there may be cases

(*d*) *R.* v. *Malings*, 8 C. & P. 242; *R.* v. *Walkling*, *Id.* 243; *R.* v. *Clifford*, 2 Car. & K. 206; *R.* v. *Manzano*, 2 F. & F. 64. See also *R.* v. *Haines*, 1 F. & F. 86; and *R.* v. *Taylor*, *Id.* 535.

(*e*) See *R.* v. *Watson*, 32 Ho. St. Tr. 538; *R.* v. *Thistlewood*, 33 *Id.* 894; *R.* v. *Ings*, *Id.* 1107; *R.* v. *Collins*, 5 C. & P. 311; *R.* v. *Frost*, 9 *Id.* 161, &c. &c. In *R.* v. *O'Coigly*, 26 Ho. St. Tr. 1191, 1374, Buller, J., gave the prisoners the option of addressing the court, either before or after their counsel had spoken.

(*f*) C. 26.

(*g*) See the authorities collected 1 Greenl. Ev. § 432, 7th Ed.; Tayl. Ev. § 1259, 4th Ed.

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where it would be judicious to refuse it. It is said that the rule does not extend to the parties in the cause (*h*); nor, at least in general, to the attornies engaged in it (*i*). A witness who disobeys such an order is guilty of contempt; but the judge cannot refuse to hear his evidence on that account (*k*), although the circumstance is matter of remark to the jury. In revenue cases in the Exchequer, indeed, it is said that his evidence is imperatively excluded (*l*). And in order to prevent communication in such cases between witnesses who have been examined and those awaiting examination, it is a rule that the former must remain in court, or at least be watched until the latter are examined. Where the first witness examined was a respectable female, and some indelicate evidence was expected to be given by the others, it was arranged that she should be taken out of court and kept under observation in a separate apartment (*m*).

2. Order of beginning, or right to begin.

§ 637. Next, with respect to the Order of Beginning, or Ordo Incipiendi. This is known in practice as the "Right to Begin:" not a very accurate expression—for it assumes that beginning is always an advantage, whereas it may be quite the reverse. There are few heads of practice on which a larger number of irreconcilable decisions have taken place. It is sometimes said that as the plaintiff is the party who brings the case into court, it is natural that he should be first heard with his complaint; and in one sense of the word the

(*h*) *Charnock* v. *Dewings*, 3 Car. & K. 378; *Constance* v. *Brain*, 2 Jur., N. S. 1145; *Selfe* v. *Isaacson*, 1 F. & F. 194.

(*i*) *Pomeroy* v. *Baddeley*, Ry. & M. 430; *Everett* v. *Lownham*, 5 Car. & P. 91.

(*k*) *Chandler* v. *Horne*, 2 Moo. & R. 423; *Cook* v. *Nethercote*, 6 C. & P. 743, and the cases there referred to; and per Lord Campbell in delivering the judgment of the court in *Cobbett* v. *Hudson*, 1 Ell. & B. 11, 14.

(*l*) Rosc. Cr. Ev. 127–8, 6th Ed.; 1 Greenl. Ev. 432, 7th Ed.; and Tayl. Ev. § 1260, 4th Ed.

(*m*) *Streeten* v. *Black*, Guildf. Sum. Ass. 1836, cor. Lord Abinger, C. B., MS.

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plaintiff always begins; for, without a single exception, the pleadings are opened by him or his counsel, and never by the defendant or his counsel. But, as it is agreed on all hands that the order of proving depends on the burthen of proof; if it appears on the statement of the pleadings, or whatever is analogous to pleadings, that the plaintiff has nothing to prove—that the defendant has admitted every fact alleged, and takes on himself to prove something which will defeat the plaintiff's claim, he ought to be allowed to begin, as the burden of proof then lies on him. The authorities on this subject present almost a chaos. Thus much is certain, that if the onus of proving the issues, or any one of the issues, however numerous they may be, lies on the plaintiff, he is entitled to begin (*n*): and it seems that if the onus of proving all the issues lies on the defendant, and the damages which the plaintiff could legally recover are either nominal, or mere matter of computation, here also the defendant may begin (*o*). But the difficulty is where the burden of proving the issue, or all the issues, if more than one, lies on the defendant, and the onus of proving the amount of damage lies on the plaintiff. A series of cases (not an unbroken series, for there were several authorities the other way), concluding with that of *Cotton* v. *James* (*p*), in 1829, established the position, that the onus of proving damages made no difference, and that under such circumstances the defendant ought to begin. Of these the most remarkable is that of *Cooper* v. *Wakley* (*q*), in 1828; where it was held by Lord Tenterden, C. J., Bayley, Littledale and Parke, JJ., that in an action by a surgeon, for libel, in imputing to him unskilfulness in per-

(*n*) *Wood* v. *Pringle*, 1 Moo. & R. 277; *James* v. *Salter*, *Id.* 501; *Curtis* v. *Wheeler*, 4 C. & P. 196; *Williams* v. *Thomas*, *Id.* 234.

(*o*) *Fowler* v. *Coster*, 1 Moo. & M. 241.

(*p*) 3 C. & P. 505; 1 Moo. & M. 273.

(*q*) 3 C. & P. 474; 1 Moo. & M. 248.

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forming a surgical operation, if the defendant pleads a justification he is entitled to begin. Thus matters stood until the case of *Carter* v. *Jones* (*r*), in 1833, which also was an action for libel, to which a justification was pleaded; and, on the right to begin being claimed by the defendant, Tindal, C. J., before whom the case was tried, said that a rule on the subject had been come to by the judges. He then stated *verbally* the nature of that rule, but his language is given very differently in the two reports of the case. In the 6 Carrington & Payne, it is reported thus: "The judges have come to a resolution, that justice would be better administered by altering the rule of practice, in the respect alluded to, and that, in future, the plaintiff should begin in all actions for personal injuries, and also in slander and libel, notwithstanding the general issue may not be pleaded, and the affirmative be on the defendant. * * * * It is most reasonable that the plaintiff, who brings the case into court, should be heard first to state his complaint." In the 1 Moody & Robinson, it is reported thus: "A resolution has recently been come to by all the judges, that in cases of slander, libel, and other actions, where the plaintiff seeks to recover actual damages of an unascertained amount, he is entitled to begin, although the affirmative of the issue may, in point of form, be with the defendant." As might have been expected, many questions arose relative to the extent of this rule, and especially its applicability to actions of contract; but a new light was thrown on the whole subject by the case of *Mercer* v. *Whall*(*s*), which came before the Court of Queen's Bench in 1845. Lord Denman, C. J., in delivering the judgment of the court, stated, p. 462, that the rule promulgated by Chief Justice Tindal in *Carter* v. *Jones*, had originally been reduced to writing, and signed with the initials of several

(*r*) 6 C. & P. 64; 1 Moo. & R. 281. (*s*) 5 Q. B. 447.

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of the judges, and was then in his own possession; that its terms were, that "in actions for libel, slander, and injuries to the person, the plaintiff shall begin, although the affirmative issue is on defendant:" adding, p. 463, that that rule was not at all intended to introduce a new practice, but was declaratory or restitutive of the old, which had been broken in upon by *Cooper* v. *Wakley*, and that class of cases (*t*). Since *Mercer* v. *Whall*, the subject seems to have been better understood: and whether the rule in *Carter* v. *Jones* is to be considered as declaratory or enacting, it certainly is a great step in the right direction, of restoring to the plaintiff his natural "right to begin," whenever he really has anything to prove. In some instances the right to begin is regulated by statute (*u*).

Erroneous ruling relative to, when rectified.

§ 638. Much of the confusion and inconsistent ruling on this subject may be traced to a notion which formerly prevailed, viz., that the order of beginning was exclusively to be determined by the judge at Nisi Prius, and consequently that the court in banc would not interfere to rectify any mistake, however gross, which might be committed in this respect (*x*). It would, it was argued, lead to much litigation and vexation if motions for new trials were entertained on such a ground; especially as, since the wrong decision of the judge would in all likelihood be founded on a misconception of the onus probandi, he would carry that erroneous view into his direction to the jury, in which case a new trial would be grantable ex debito justitiæ for an inversion of the burden of proof. But in many cases, the fact of allowing

(*t*) It is remarkable, that in all the cases decided on the construction of this rule between 1833 and 1845, and they are very numerous, not a single expression of any judge is to be found implying that it was declaratory in its nature.

(*u*) E. g., 15 & 16 Vict. c. 83, s. 41.

(*x*) *Bird* v. *Higginson*, 2 A. & E. 160; *Burrel* v. *Nicholson*, 1 Moo. & R. 304; *Ashby* v. *Bates*, 15 M. & W. 596, per Rolfe, B.

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the wrong party to begin might be productive of the greatest mischief, although followed by an unimpeachable summing-up; and a series of authorities has now settled, that where the ruling of the judge with reference to the right to begin, is erroneous in the judgment of the court in banc, and "clear and manifest wrong" has resulted from that ruling, a new trial will be granted by the court, not as matter of right, but as matter of judgment (*y*).

Advantage and disadvantage of having to begin.

§ 639. The right to begin is an advantage to a party who has a strong case and good evidence, as it enables him to make the first impression on the tribunal; and if evidence is adduced by the opposite side, it entitles him to reply, thus giving him the last word. But if the case of a party be a weak one; if he has only slight evidence, or perhaps none at all to adduce in support of it; and goes to trial on the chance (if defendant) of the plaintiff being nonsuited, or that the case of the opposite party may break down through its own intrinsic weakness; or trusting to the effect of an address to the jury; the fact of his having to begin might prove instantly fatal to his cause. Thus in *Edwards* v. *Jones* (*z*), which was an action by the indorsee against the maker of a promissory note, to which the defendant pleaded a long plea, amounting in substance to want of consideration for the note; to a portion of which the plaintiff replied, that there had been a good consideration given for it, and to the rest entered a nolle prosequi; the judge having ruled that the defendant should begin, his counsel was obliged to admit that he had no witnesses; and the

(*y*) *Geach* v. *Ingall*, 14 M. & W. 95; *Edwards* v. *Matthews*, 11 Jur. 398; *Brandford* v. *Freeman*, 5 Exch. 734; *Leete* v. *The Gresham Life Insurance Society*, 15 Jur. 1161; *Ashby* v. *Bates*, 15 M. & W. 589; *Booth* v. *Millns*, *Id.* 669; *Huckman* v. *Fernie*, 3 M. & W. 505 (as corrected in *Booth* v. *Millns*, *Edwards* v. *Matthews*, and *Brandford* v. *Freeman*); *Mercer* v. *Whall*, 5 Q. B. 447; *Doe* d. *Worcester Trustees* v. *Rowlands*, 9 C. & P. 736; *Doe* d. *Bather* v. *Brayne*, 5 C. B. 655.

(*z*) 7 C. & P. 633.

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judge immediately directed the jury to find a verdict against him.

3. Rule against stating facts without offering evidence of them.

§ 640. 3. We have already referred to the rule of practice which prohibits counsel, or the parties in civil cases (*a*), and perhaps also the counsel for accused parties in criminal cases (*b*), from stating any facts to the jury which they do not intend offering evidence to prove. This must not, however, be understood too literally. A counsel or party has a right to allude to any facts of which the court takes judicial cognizance, or the notoriety of which dispenses with proof (*c*). But more difficulty arises with respect to historical facts. A public and general history is receivable in evidence to prove a matter relating to the kingdom at large (*d*); probably for the same reason that the law permits matters of public and general interest to be proved by the declarations of deceased persons, who may be presumed to have had competent knowledge on the subject; or by old documents which, under ordinary circumstances, would be rejected for want of originality (*e*). Although there are cases to be found in the books where histories have been received in evidence, and which it might be difficult to support on this principle (*f*). But a history is not receivable to prove a private right or particular custom (*g*). In a recent case (*h*), it was held by the Court of Exchequer, that counsel, or a party at a trial, may refer to matters of general history, provided the licence be exercised with prudence; but cannot

Matters of history.

(*a*) *Suprà*, §§ 631, 635.

(*b*) *Suprà*, § 635.

(*c*) Bk. 3, pt. 1, ch. 1, §§ 252–254.

(*d*) B. N. P. 248; 2 Phill. Ev. 155, 10th Ed.; Tayl. Ev. § 1585, 4th Ed.

(*e*) Bk. 3, pt. 2, ch. 4, §§ 497, 499.

(*f*) See 2 Phill. Ev. 155—6, 10th Ed.; Tayl. Ev. § 1585, 4th Ed.

(*g*) 2 Phill. Ev. 155, 10th Ed.; Tayl. Ev. § 1585, 4th Ed.

(*h*) *Darby* v. *Ouscley*, 2 Jurist, N. S. 497; 1 H. & N. 1.

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refer to particular books of history, or read particular passages from them, to prove any fact relevant to the cause. Also that works of standard authority in literature may, provided the privilege be not abused, be referred to by counsel or a party at a trial, in order to show the general course of composition, explain the sense in which words are used, and matters of a like nature; but that they cannot be resorted to for the purpose of proving facts relevant to the cause. And Sir Edward Coke lays down—"Authoritates philosophorum, medicorum et poetarum sunt in causis allegandæ et tenendæ" (*i*).

4. Practice respecting "Leading Questions."

§ 641. 4. The chief rule of practice relative to the interrogation of witnesses is that which prohibits "*leading* questions:" i. e. questions which, directly or indirectly, suggest to the witness the answer he is to give. The

General rule.

rule is, that on material points a party must not lead his own witnesses, but may lead those of his adversary; in other words, that leading questions are allowed in cross-examination, but not in examination in chief. This seems based on two reasons. First, and principally, on the supposition that the witness has a bias in favour of the party bringing him forward, and hostile to his opponent. Secondly, that the party calling a witness has an advantage over his adversary, in knowing beforehand what the witness will prove, or at least is expected to prove; and that, consequently, if he were allowed to lead, he might interrogate in such a manner as to extract only so much of the knowledge of the witness as would be favourable to his side, or even put a false gloss upon the whole (*k*). On all matters, however, which are merely introductory, and form no part of the substance of the inquiry, it is both allowable and proper for a party to lead his own witnesses, as other-

(*i*) Co. Litt. 264 a.

(*k*) Ph. & Am. Ev. 887; 2 Ph. Ev. 461, 10th Ed.

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wise much time would be wasted to no purpose. It is sometimes said that the test of a leading question is, whether an answer to it by "Yes" or "No" would be conclusive upon the matter in issue (*l*); but although all such questions undoubtedly come within the rule, it is by no means limited to them. Where "Yes" or "No" would be conclusive on any part of the issue, the question would be equally objectionable: as if, on traverse of notice of dishonour of a bill of exchange, a witness were led either as to the fact of giving the notice, or as to the time when it was given. So, leading questions ought not to be put when it is sought to prove material and proximate circumstances. Thus, on an indictment for murder by stabbing, the asking a witness if he saw the accused covered with blood and with a knife in his hand coming away from the corpse, would be in the highest degree improper, though all the facts embodied in this question are consistent with his innocence. In practice leading questions are often allowed to pass without objection, sometimes by express, and sometimes by tacit consent. This latter occurs where the questions relate to matters which, though strictly speaking in issue, the examining counsel is aware are not meant to be contested by the other side; or where the opposing counsel does not think it worth his while to object.

On the other hand, however, very unfounded objections are constantly taken on this ground. A question is objectionable as leading when it suggests the *answer*, not when it merely directs the attention of the witness to the *subject* respecting which he is questioned. On a question whether A. and B. were partners, it has been held not a leading question to ask if A. has interfered in the business of B. (*m*); for, even supposing he had, that falls far short of constituting

(*l*) Rosc. Crim. Ev. 130, 6th Ed. (*m*) *Nicholls* v. *Dowding*, 1 Stark. 81.

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him a partner. In an action for slander (*n*), in saying of a tradesman that "he was in bankrupt circumstances, that his name had been seen in a list in the Bankruptcy Court, and would appear in the next Gazette;" a witness,—having deposed to a conversation with the defendant, in which he made use of the first two of these expressions,—was asked, "Was anything said about the Gazette?" This was objected to as leading, but was allowed by Tindal, C. J. So, although there is no case where leading should be avoided more than when it is sought to prove a confession; still a witness who deposes to a conversation with the accused, may, after having first exhausted his memory in answering the question,—what took place at it, be further asked, whether anything was said on such a subject, i. e. on the subject-matter of the indictment. It should never be forgotten that "leading" is a relative, not an absolute term. There is no such thing as "leading" in the abstract—the identical words which would be leading of the grossest kind in one case or state of facts, would be not only unobjectionable, but the very fittest mode of interrogation in another.

Exceptions.

§ 642. There are some exceptions to the rule against leading. 1. For the purpose of identifying persons or things, the attention of the witness may be directly pointed to them. 2. Where a witness is called to contradict another, as to expressions out of court which he denies having used, he may be asked directly, Did the former witness use such and such words (*o*)? The authorities are not quite agreed as to the reason of this exception (*p*); and some strongly contend, that the memory of the second witness ought first to be ex-

(*n*) *Rivers* v. *Hague*, C. B. Sittings after Mich. Term, 1837, MS.

(*o*) *Edmonds* v. *Walter*, 3 Stark. 7.

(*p*) *Courteen* v. *Touse*, 1 Campb. 43; *Hallett* v. *Cousens*, 2 Moo. & R. 238.

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hausted, by his being asked what the other said on the occasion in question (*q*). 3. The rule which excludes leading questions being chiefly founded on the assumption, that a witness must be taken to have a bias in favour of the party by whom he is called, whenever circumstances show that this is not the case, and that he is either hostile to that party or unwilling to give evidence, the judge will in his discretion allow the rule to be relaxed (*r*). And it would seem, that for the same reason, if the witness shows a strong bias in favour of the cross-examining party, the right of leading him ought to be restrained; but the authorities are not quite clear about this (*s*). 4. The rule will be relaxed, where the inability of a witness to answer questions put in the regular way, obviously arises from defective memory; or 5. From the complicated nature of the matter as to which he is interrogated.

Expediency of leading, when allowable.

§ 643. Although the not leading one's own witness when allowable is by no means so bad a fault as leading improperly, still it is a fault; for it wastes the time of the court, has a tendency to confuse the witness, and betrays a want of expertness in the advocate. There are, however, cases where it is advisable not to lead under such circumstances. Thus on a criminal trial, where the question turns on identity, although it would be perfectly regular to point to the accused, and ask a witness if that is the person to whom his evidence relates, yet if the witness can, unassisted, single out the accused, his testimony will have more weight.

5. Discrediting the adversary's witnesses.

§ 644. 5. One of the chief rules of evidence, as has been shewn, is, that no evidence ought to be received

(*q*) Ph. & Am. Ev. 889; 1 Ph. Ev. 463, 10th Ed.

(*r*) Ph. & Am. Ev. 888; 2 Ph. Ev. 462, 10th Ed.

(*s*) See Rosc. Crim. Ev. 131, 6th Ed.; 2 Phill. Ev. 472—3, 10th Ed.; Tayl. Ev. § 1288, 4th Ed.

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which does not bear, immediately or mediately, on the matters in dispute (*t*). As a corollary from this, all questions tending to raise collateral issues, and all evidence offered in support of such issues, ought to be rejected. But many difficulties arise in practice, as to what shall be deemed a collateral issue with reference to the credit of witnesses. In addition to counter-proofs and cross-examination, there are three ways of throwing discredit on the testimony of an adversary's witness.

1. Evidence of general bad character for veracity.

1. By giving evidence of his general bad character for veracity, i. e. the evidence of persons who depose that he is in their judgment unworthy of belief, even though on his oath. And here the inquiry must be limited to what they know of his general character, on which alone that judgment should be founded; particular facts cannot be gone into (*u*). "There are two reasons," says Parke, B., in the *Attorney-General* v. *Hitchcock* (*x*), "why collateral questions, such as a witness having committed some particular crime, cannot be entered into at the trial. One is that it would lead to complicated issues and long inquiries without notice; and the other that a man cannot be expected to defend all the acts of his life." And Alderson, B., in his judgment in that case (*y*), says, "The inconvenience of asking a witness about particular transactions, which he might have been able to explain if he had had reasonable notice that he would be required to do so, would be great—a man does not come into the witness-box prepared to shew that every act of his life has been perfectly pure: and you therefore compel the opposite party to take his answer relative to the matter imputed, as otherwise you might go on to try a collateral issue; and if you were allowed to try the collateral issue of the witness having committed some offence, you might call witnesses to prove that fact, and they again might likewise be cross-ex-

(*t*) Bk. 3, pt. 1, ch. 1.
(*u*) *Id.*
(*x*) 11 Jurist, 478, 479.
(*y*) p. 481.

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amined as to their own conduct; and so you might go on proving collateral issues without end before you could come to the main one. The rules of evidence stop this in the first instance for the more convenient administration of justice; and you must therefore take the witness's answer, and indict him for perjury if it is false."

2. By shewing that he has on former occasions made statements inconsistent with the evidence he has given. But this is limited to such evidence as is relevant to the cause: for a witness cannot be contradicted on collateral matters (*z*). The 17 & 18 Vict. c. 125, s. 23, enacts: "If a witness, upon cross-examination as to a former statement made by him relative to the subject-matter of the cause, and inconsistent with his present testimony, does not distinctly admit that he has made such statement, proof may be given that he did in fact make it; but before such proof can be given, the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such statement." By sect. 103, the enactments of this section apply and extend to every court of civil judicature in England and Ireland; and 28 Vict. c. 18, ss. 4 and 1, contains similar provisions applicable to all courts of judicature, as well criminal as all others. 3. By proving misconduct connected with the proceedings, or other circumstances shewing that he does not stand indifferent between the contending parties (*a*). Thus it may be proved that a witness has been bribed to give his evidence (*b*), or has offered bribes to others to give evidence for the party whom he favours (*c*), or that he has used

2. Statements by witness inconsistent with his evidence.

17 & 18 Vict. c. 125, ss. 23, 103.

28 Vict. c. 18, ss. 4, 1.

3. Misconduct connected with the proceedings.

(*z*) 1 Stark. Evid. 189, 3rd Ed.; 2 Ph. Evid. 517 *et seq.*, 10th Ed.

(*a*) There are some authorities to the contrary; but they seem overruled by the *Attorney-General* v. *Hitchcock*, 1 Exch. 91; 11 Jur. 478, and the cases there cited; and are indefensible on principle.

(*b*) *Langhorn's case*, 7 Ho. St. Tr. 446, recognized in the *Attorney-General* v. *Hitchcock*, 1 Exch. 91; 11 Jur. 478.

(*c*) *Lord Stafford's case*, 7 Ho.

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expressions of animosity and revenge towards the party against whom he bears testimony (*d*), &c. We must also direct attention to the following observations of Parke, B., in the *Attorney-General* v. *Hitchcock* (*e*). "Under the old law when an objection was raised to the competency of a witness, he might be examined as to it on the voir dire, and evidence might be adduced to contradict his statement; and the issue thus raised was determined by the judge. * * * At that time those objections went to the disability of the witness; but it becomes an important question whether the same course should be adopted now, since Lord Denman's Act, 6 & 7 Vict. c. 85 has provided, that no person shall be excluded from giving evidence by reason of incapacity from crime or interest—is all evidence of his being interested to be excluded from the view of the jury?" This suggestion does not however appear to be followed in practice.

6. Discrediting party's own witnesses.

§ 645. 6. With respect to the right of a party to discredit his own witnesses. We will consider the matter, first, as it stood at the common law, and secondly, under the 17 & 18 Vict. c. 125, and 28 Vict. c. 18. First, then, of the common law. It was an established rule, that a party should not be allowed to give *general* evidence to discredit his own witness, i. e. general evidence that he is unworthy of belief on his oath. By calling the witness, a party represents him to the court as worthy of credit, or at least not so infamous as to be wholly unworthy of it; and if he afterwards attack his general character for veracity, this is not only mala fides towards the tribunal, but, say the books, it "would enable the

1. At common law.

St. Tr. 1400, recognized in *The Attorney-General* v. *Hitchcock*, 1 Exch. 91; 11 Jur. 478.

(*d*) *Yewin's case*, 2 Camp. 638.

See ad id. *The Attorney-General* v. *Hitchcock*, 1 Exch. 91; 11 Jur 478.

(*e*) 11 Jurist, 478, 480.

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party to destroy the witness if he spoke against him, and to make him a good witness if he spoke for him, with the means in his hand of destroying his credit if he spoke against him" (*f*). A party might however discredit his own witness *collaterally*, by adducing evidence to shew that the evidence which he gave was untrue in fact (*g*). This does not raise the slightest presumption of mala fides; and it would be in the highest degree unjust and absurd, if parties were bound by the unfavourable statements of witnesses with whom they may have no privity, and who are frequently called by them from pure necessity. But whether it was competent for a party to shew, that his own witness had made statements out of court inconsistent with the evidence which he had given in it, was an unsettled point, on which however the weight of authority was in favour of the negative (*h*). On the one hand it was urged, that this falls within the principle of the general rule that a party must not be allowed directly to discredit his own witness (*i*); that to admit proof of contradictory statements would tend to multiply issues; that it would enable a party to get the naked statement of a witness before the jury, operating in fact as substantive evidence (*k*); that there would be some danger of collusion and dishonest contrivance, inasmuch as a witness might be induced to make a statement out of court, for the very purpose of its being reserved, and afterwards used in contradiction to him, and that the jury might regard such a statement as substantive evidence in the cause. Moreover, the use of oaths and the other sanctions of truth is to extract facts which parties might be willing to conceal, and the allowing a witness to be thus contradicted holds out an induce-

(*f*) B. N. P. 297; 2 Phill. Ev. 525, 10th Ed.

(*g*) 2 Ph. Ev. 526, 10th Ed.

(*h*) See the cases collected, Tayl. Ev. § 1049, 1st Ed.; 2 Ph. Ev. 528 *et seq.*, 10th Ed.; and *Melhuish* v. *Collier*, 15 Q. B. 878.

(*i*) Ph. & Am. Ev. 904.

(*k*) Tayl. Ev. § 1048, 1st Ed.

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ment to him, to maintain by perjury *in* court any false or hasty statements he may have made *out* of it. The following reasoning on the other side is taken from a work of authority (*l*). "It may be argued, the evidence is not open to the objection, that the party would thus discredit his own witness by general testimony; that, although a party, who calls a person of bad character as witness, knowing him to be such, ought not to be allowed to defeat his testimony because it turns out unfavourable to him, by direct proof of general bad character,—yet it is only just that he should be permitted to shew, if he can, that the evidence has taken him by surprise, and is contrary to the examination of the witness, preparatory to the trial; that this course is necessary, as a security against the contrivance of an artful witness, who otherwise might recommend himself to a party by the promise of favourable evidence, (being really in the interest of the opposite party,) and afterwards by hostile evidence ruin his cause; that the rule, with the above exception, as to offering contradictory evidence, ought to be the same, whether the witness is called by the one party or the other, and that the danger of the jury's treating the contradictory matter as substantive testimony, is the same in both cases; that, as to the supposed danger of collusion, it is extremely improbable, and would be easily detected. It may be further remarked, that this is a question, in which not only the interests of litigating parties are involved, but also the more important general interests of truth, in criminal as well as in civil proceedings; that the ends of justice are best attained, by allowing a free and ample scope for scrutinizing evidence and estimating its real value; and that in the administration of criminal justice, more especially, the exclusion of the proof of contrary statements might be attended with the worst consequences."

(*l*) Ph. & Am. Ev. 905.

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Besides, it by no means follows that the object of a party in contradicting his own witness is to impeach his veracity—it may be to shew the faultiness of his memory (*m*). In this state of the law the 17 & 18 Vict. c. 125, ss. 22, 103, was passed, which is in some respects only declaratory of the principles already laid down. That section enacts: "A party producing a witness shall not be allowed to impeach his credit by general evidence of bad character, but he may, in case the witness shall in the opinion of the judge prove adverse, contradict him by other evidence, or, by leave of the judge, prove that he has made at other times a statement inconsistent with his present testimony; but before such last-mentioned proof can be given, the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such statement." It has been held by the Court of Common Pleas, that the term "adverse" in this section must be understood in the sense of the witness exhibiting a *hostile mind* towards the party calling him, and not merely in the sense that his testimony turns out to be "unfavourable" to that party (*n*); and by the Court of Queen's Bench, that a statement contradicting the evidence of a witness under it may be contained in a series of documents, not one of which, taken by itself, would amount to a contradiction of the witness (*o*). By sect. 103, the enactments in this section apply and extend to every court of civil judicature in England and Ireland; and 28 Vict. c. 18, ss. 3, 1, contains similar provisions applicable to all courts of judicature, as well criminal as others, &c.

2. 17 & 18 Vict. c. 125, ss. 22, 103.

Meaning of "adverse" in this enactment.

28 Vict. c. 18, ss. 3, 1.

§ 646. 7. While the indefinite, or even frequent ad- 7. Adjournment of trial.

(*m*) Tayl. Ev. § 1047, 1st Ed.
(*n*) *Greenough* v. *Eccles*, 5 C. B., N. S. 786.
(*o*) *Jackson* v. *Thomason*, 1 B. & S. 745.

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journment of its proceedings is at variance with the very nature of a judicial tribunal (*p*), still a power of adjournment in certain cases, exercised with due caution and discretion, is indispensable to the sound and complete administration of justice. On this subject, the Commissioners for inquiring into the process, practice and system of pleading in the Superior Courts of Common Law, express themselves as follows (*q*): "It occasionally happens that a party is taken by surprise by his adversary's case; that a witness or a document becomes unexpectedly necessary, and is not forthcoming; that a document turns out to be attested, and the attesting witness is not present; or requires a stamp, but no stamp, or an insufficient one, has been affixed. In these and the like cases, miscarriage of justice must occur unless time is afforded to enable the deficient matter to be supplied. We think the rigorous inflexibility with which a cause once commenced is now carried on to its close, might be modified with advantage. No doubt, encouragement should not be held out to parties to be negligent in getting up their proofs or coming unprepared to trial; but, on the other hand, it is important not to allow justice to miscarry, or parties to be put to the expense of another trial, when, by a temporary adjournment, a deficiency in proof may be supplied." These views have been carried into effect by 17 & 18 Vict. c. 125, s. 19, which enacts, that "It shall be lawful for the court or judge, at the trial of any cause, where they or he may deem it right for the purposes of justice, to order an adjournment for such time, and subject to such terms and conditions as to costs, and otherwise, as they or he may think fit." By sect. 103, the enactment in this section applies and extends to every court of civil judicature in England and Ireland.

17 & 18 Vict. c. 125, ss. 19, 103.

(*p*) Introd. pt. 2, §§ 41 *et seq.* (*q*) Second Report, p. 10.

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§ 647. 8. There are two ways of questioning the ruling of a court or judge on matters of evidence in *civil* cases. 1. By bill of exceptions founded on the statute West. 2 (13 Edw. I.), c. 31, stat. 1:—"Cum aliquis implacitatus coram aliquibus justiciariis, proponat exceptionem et petat quod justiciarii eam allocent, quam si allocare noluerint, si ille, qui exceptionem proponet, scribat illam exceptionem et petat quod justiciarii apponant sigilla in testimonium, justiciarii sigilla sua apponant; et si unus apponere noluerit, apponat alius de societate." If a judge refuses to seal a bill of exceptions the party may have a compulsory writ against him, commanding him to seal it if the fact alleged be truly stated; and if he returns that the fact is untruly stated, when the case is otherwise, an action will lie against him for making a false return (*r*). This bill of exceptions becomes part of the record; and, judgment being signed in the court below, is heard and determined by a court of error. 2. By application to the court in banc for a new trial. Bills of exceptions, although the regular and proper course provided by law for rectifying mistakes committed by judges at trials, fell into comparative disuse, partly through an absurd notion that the tendering a bill of exceptions was disrespectful to the judge, but principally to avoid expense and delay. Of late years they have become more frequent, and in matters of much weight and consequence ought in general to be resorted to. For, previous to the 17 & 18 Vict. c. 125, ss. 34—42, there was no mode of reviewing the decision of a court relative to the granting or refusing a new trial; and even under that statute the right to appeal from such decision is subject to some limitations; whereas, when a bill of exceptions has been brought into the Exchequer Chamber, either party, if dissatisfied with the judgment of that court upon it, has his appeal to the

8. Ways of questioning the ruling of a tribunal on evidence.

1. In civil cases.

1. Bill of exceptions.

2. New trial.

17 & 18 Vict. c. 125, ss. 34—42.

(*r*) 3 Blackst. Comm. 372.

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House of Lords. Besides, the rule—that a party who moves to set aside a verdict on the ground of erroneous ruling by a judge, is in the same situation with respect to relief as if he had tendered a bill of exceptions,—although useful as a general principle to guide the discretion of courts, does not hold universally. A court will often refuse a new trial, even where an undoubted error has been committed by the judge, if they think that under all the circumstances justice has been done (*s*); but no such consideration could weigh with the Court of Error, which, if it deems the ruling of the inferior court erroneous, must award a venire de novo. There are other points of difference between the remedy by bill of exceptions, and that by motion for a new trial.

2. In criminal cases.

§ 648. 2. As to *criminal* cases. It is said that bills of exceptions do not lie here (*t*)—and they are certainly never seen in practice. But the Court of Queen's Bench will grant a new trial in certain cases of misdemeanor (*u*); and on one occasion it did so in a case of felony (*x*). But the propriety of this decision is questionable (*y*): and the Privy Council, in a recent case, refused to be bound by it (*z*). Formerly, when the judge before whom a criminal cause was tried at the Central Criminal Court, or on circuit, &c., entertained a doubt on any point of law or evidence, he reserved

(*s*) *Atkinson* v. *Pocock*, 12 Jurist, 60, and the cases there cited; *Cox* v. *Kitchin*, 1 Bos. & P. 338; *Wickes* v. *Clutterbuck*, 2 Bingh. 483; *Doe* d. *Welsh* v. *Langfield*, 16 M. & W. 497; *Mortimer* v. *M'Callan*, 6 *Id.* 58; *Bessey* v. *Wyndham*, 6 Q. B. 166; *Stindt* v. *Roberts*, 5 D. & L. 460.

(*t*) Ph. & Am. Ev. 947; 2 Ph. Evid. 541—2, 10th Ed.

(*u*) Archb. Cr. Off. Pract. 96, 97; *R.* v. *Whitehouse*, 1 Dearsl. C. C. 1; *R.* v. *Russell*, 3 E. & B. 942.

(*x*) *R.* v. *Scaife*, 2 Den. C. C. 281.

(*y*) See the note to that case, 2 Den. C. C. 286; also *R.* v. *Russell*, 3 E. & B. 942, 950, per Lord Campbell; *R.* v. *Mawbey*, 6 T. R. 619, 638, per Lord Kenyon.

(*z*) *Reg.* v. *Bertrand*, L. Rep., 1 P. C. 520.

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the question for the consideration of the judges of the superior courts, who heard it argued, and if they thought the accused improperly convicted recommended a pardon. But the judges sitting in this way had no jurisdiction as a court, and were only assessors to advise the judge by whom the matter was brought before them. By 11 & 12 Vict. c. 78, however, this was altered; and a regular tribunal, consisting of at least five of the judges of the superior courts at Westminster, (including one of the Chief Justices or the Chief Baron,) was constituted, for the decision of all points reserved on criminal trials by any court of oyer and terminer, or gaol delivery, or court of quarter sessions. But neither under the old practice nor under this statute, have the parties to a criminal proceeding any *compulsory* means of reviewing the decision of the judge.

11 & 12 Vict. c. 78.

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PART II.

ELEMENTARY RULES FOR CONDUCTING THE EXAMINATION AND CROSS-EXAMINATION OF WITNESSES.

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Design of this Part.

§ 649. In the preceding Part the main object of this work was brought to a close. The final one, at which we have now arrived, will be devoted, not to law or practice, but to elementary rules for the guidance of advocates in dealing with witnesses. Much of what follows will doubtless appear very obvious to readers

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experienced in such affairs, but it is not for them that this Part is intended (*a*).

§ 650. There is a very prevalent notion that all discussion or comment on this subject is necessarily useless, if not worse. This seems to have arisen partly from a superficial view of the matter, and partly from misapprehension of a passage in Quintilian, in which he is supposed to intimate his opinion that the faculty of interrogating witnesses with effect must be the result either of natural acuteness, or of practice. If the Roman critic meant, what he certainly does not ex- An objection answered.

(*a*) This part being designed solely for those whose forensic experience has either not commenced, or is very limited, we may perhaps be excused for inserting the following judicious advice given to young advocates by some eminent foreign writers. "A yonng man ought to present himself with an honest assurance and plead with firmness, but with modesty in his language and demeanour. He should avoid the affectation of fetching things from too far, and should not wander from his subject. If he demands a favourable hearing, let him do it with dignity, and not in a rampant tone. He ought neither exalt himself too much, nor humble himself too much, and the less he can manage to talk about himself the better. If either the manner or matter of his discourse affords room for criticism, he should hear it patiently. The best works are subject to that; and a young man, especially, must not flatter himself with being all at once above paying this tribute, from which even those who have grown old in the career are not exempt." Histoire abrégée de l'Ordre des Avocats, par M. Boucher d'Argis, ch. 11. The reader will find this in M. Dupin's work, entitled "Profession d'Avocat,—Recneil de Pièces contenant l'Exercice de cette Profession." A good warning is likewise to be found in the following: "Alii memoriæ auditorum consulturi, solis inhærebant conclusionibus, easque modo per caussarum genera, quæ vocant, modo per quæstiones disponebant: modo se præclare suo functos officio existimabant, si ad singulos titulos aliquot casuum leviter enucleatorum centurias proponerent. * * * * Illi ad memoriam omnia referebant, et si qui jejuna ista præcepta edidicerant, et ad singulas quæstiones ipsa compendii verba poterant reddere, eos aliquot casuum et quæstiuncularum myriadibus suffarciuatos, et phaleris ornatos doctoralibus, ablegabant in forum, strepitum his armis non sine horrore judicis daturos:" Heineccius, ad Inst. Præf. p. ix.

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press—his language being "Naturali magis acumine, aut usu contingit hæc virtus"—that *no* rules can be laid down for the guidance of advocates in this respect, he was most inconsistent with himself; for in the very chapter from which the above passage is taken (*b*), he gives a series of rules for that purpose, which have been admired in every age, and are recommended by high authorities in our own law (*c*). The present chapter is in truth chiefly founded on them, as the constant references will shew. It would indeed be strange if, while perfection in all other arts and sciences is attained by the combination of study and experience; the faculty of examining witnesses with effect,—which depends so much on knowledge of human nature, and acquaintance with the resources of falsehood and evasion, and is coeval with judicature itself,—should be destitute of all fixed principles.

"Examination," and "cross-examination" or "examination ex adverso."

§ 651. The terms "examination in chief" and "cross-examination" are commonly applied, respectively, to the interrogation of witnesses by the party who presents them to the tribunal and by his adversary; the legal rules of practice governing both being, as has been shewn in the preceding Part (*d*), mainly based on the principle that every witness produced ought, in the first instance at least, to be presumed favourably disposed towards the party by whom he is called. The very opposite is, however, often the fact; and accordingly in what follows the term "cross-examination" will

(*b*) Quintil. Inst. Orat. lib. 5, cap. 7, De Testibus. Quintilian refers to the dialogues of the Socratic philosophers, and especially those of Plato, as affording good studies in the art of cross-examination. Among Plato's Divine Dialogues, see in particular the Protagoras, Second Alcibiades, Theages, and Eutyphron.

(*c*) 3 Blackst. Comm. 374; Ph. & Am. Ev. 908; 1 Greenl. Evid. § 446, Note (1), 7th Ed.

(*d*) *Suprà*, pt. 1, ch. 2, §§ 641, 642.

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be used in the sense of "examination ex adverso" (*e*): i. e. the interrogation by an advocate of a witness hostile to his cause, without reference to the form in which the witness comes before the court.

Examination of witnesses favourable to the cause of the interrogator.

§ 652. In the former of these cases, i. e. in the interrogation of witnesses favourable to the cause of the advocate by whom they are interrogated, the following advice is given by Quintilian, in the part of his work to which reference has been made: "Si habet testem cupidum lædendi, cavere debet hoc ipsum, ne cupiditas ejus appareat; nec statim de eo quod in judicium venit rogare, sed aliquo circuitu ad id pervenire, ut illi, quod maximè dicere voluit, videatur expressum; nec nimiùm instare interrogationi, ne ad omnia respondendo testis fidem suam minuat; sed in tantum evocare eum, quantum sumere ex uno satis sit" (*f*).

Examination of witnesses whose disposition towards the cause of the interrogator is unknown to him.

So, when the disposition of the witness towards his cause is unknown to the advocate: "Si nesciet actor quid propositi testis attulerit: paulatim, et (ut dicitur) pedetentim interrogando experietur animum ejus, et ad id responsum quod eliciendum erit, per gradus ducet. Sed, quia nonnunquam sunt hæ quoque testium artes, ut primò ad voluntatem respondeant, quo majore fide diversa posteà dicant, est oratoris, suspectum testem dum prodest, dimittere" (*g*). In another part of the same chapter he adds: "Illæ verò pessimæ artes, testem subornatum in subsellia adversarii mittere, ut inde excitatus plus noceat, vel dicendo contra reum, cum quo sederit; vel quùm adjuvisse testimonio videbitur, faciendo ex industriâ multa immodestè atque intemperanter, per quæ non à se tantùm dictis detrahat fidem, sed cæteris quoque, qui profuerant, auferat auctoritatem: quorum mentionem habui, non ut fierent, sed ut vitarentur."

(*e*) 1 Benth. Jud. Ev. 496 and 500.

(*f*) Quint. *in cap. cit.*

(*g*) *Id.*

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"Cross-examination," or "examination ex adverso."

§ 653. On the subject of "cross-examination," or "examination ex adverso," the following celebrated passages of the same author should be attentively studied (*h*). "In eo qui verum invitus dicturus est, prima felicitas interrogantis est extorquere quod is noluerit. Hoc non alio modo fieri potest, quàm longiùs interrogatione repetitâ. Respondebit enim quæ nocere causæ non arbitrabitur: ex pluribus deinde quæ confessus erit, eò perducetur, ut, quod dicere non vult, negare non possit. Nam, ut in oratione sparsa plerumque colligimus argumenta, quæ per se nihil reum aggravare videantur, congregatione deinde eorum factum convincimus; ita hujusmodi testis multa de anteactis, multa de insecutis, loco, tempore, personâ, cæterisque est interrogandus, ut in aliquod responsum incidat, post quod illi vel fateri quæ volumus, necesse sit, vel iis quæ jam dixerit repugnare. Id si non contingit, reliquum erit, ut eum nolle dicere manifestum sit: protrahendusque, ut in aliquo quod vel extra causam sit, deprehendatur: tenendus etiam diutius, ut omnia, ac plura quàm res desiderat, pro reo dicendo, suspectus judici fiat; quo non minùs nocebit, quàm si vera in reum dixisset." * * * * * * "Primum est, nosse testem. Nam, timidus terreri, stultus decipi, iracundus concitari, ambitiosus inflari, longus protrahi potest: prudens verò et constans, vel tanquam inimicus et pervicax dimittendus statim; vel non interrogatione, sed brevi interlocutione patroni refutandus est; aut aliquo, si continget, urbane dicto refrigerandus; aut, si quid in ejus vitam dici poterit, infamiâ criminum destruendus. Probos quosdam et verecundos non asperè incessere profuit; nam sæpe, qui adversùs insectantem pugnassent, modestiâ mitigantur. Omnis autem interrogatio aut in causâ est, aut extra causam. In causâ, patronus altiùs, et unde nihil suspecti sit, repetita percontatione, priora sequentibus applicando, sæpe eò perducit homines, ut invitis quod prosit

(*h*) Quint. *in cap. cit.*

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extorqueat. * * * * Illud fortuna interdum præstat, ut aliquid quod inter se parum consentiat, à teste dicatur: interdum (quod sæpius evenit), ut testis testi diversa dicat: acuta autem interrogatio, ad hoc quod casu fieri solet, etiam ratione perducet. Extra causam, quoque, multa quæ prosint, rogari solent; de vitâ testium aliorum, de suâ quisque, si turpitudo, si humilitas, si amicitia accusatoris, si inimicitiæ cum reo; in quibus aut dicant aliquid quod prosit, aut in mendacio vel cupiditate lædendi deprehendantur. Sed in primis interrogatio debet esse circumspecta, quia multa contra patronos venustè testis sæpe respondet, eique præcipuè vulgò favetur. Tum verbis quàm maximè ex medio sumptis, ut, qui rogatur, (is autem sæpius imperitus,) intelligat, aut ne intelligere se neget, quod interrogantis non leve frigus est."

1°. Testimony false in toto.

§ 654. In dealing with examination ex adverso, we propose to consider separately the cases: 1°. Where the evidence of the witness is false in toto. 2°. Where a portion of it is true, but a false colouring is given by the witness to the whole transaction to which he deposes—either by the suppression of some facts, or the addition of others, or both. 1. Of the former of these, the most obvious, though not the most usual case, is where the answers extracted shew that the fact deposed to is physically impossible. A good instance is afforded by the case of the Comte de Morangiés (*i*). "The question was, whether Monsieur de Morangiés had received a sum of 300,000 francs, for which he had given notes of hand to a person called Véron. These notes of hand he affirmed had been obtained from him fraudulently. Dujonquai, grandson of Véron, affirmed that he had himself on foot transported that sum to Morangiés, at his hotel, in thirteen journeys, between

1. Where the fact deposed to is physically impossible.

(*i*) We cite from the Law Magazine, N. S. vol. i. p. 24.

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seven in the morning and about one in the afternoon, making about five hours and a half or six hours. The fact was shewn to be impossible, as follows. Dujonquai said that he had divided the sum into thirteen bags, each containing six hundred louis, and twenty-three other sacks of two hundred pounds; twenty-five louis were given to Dujonquai by Morangiés. On each occasion Dujonquai put a sack of two hundred louis in each of his pockets, which, according to the fashion of the day, flapped over his thighs, and took a sack of six hundred guineas under his arm. According to the measured distance from the alley in which Dujonquai lived to the house of Morangiés, the space traversed by Dujonquai, in his thirteen journeys, would amount to five French leagues and a half; the time for each league being calculated at an hour for a person walking rather faster than usual. So far there is no absolute physical impossibility, however improbable it might be that Dujonquai should not stop a moment for refreshment or repose; but in going, Dujonquai had sixty-three steps to come down in his own house, and twenty-seven to go up at that of Morangiés, making in all ninety multiplied by twenty-six: this amounted to two thousand three huudred and forty steps. Now it was known, that to ascend the three hundred and eighty steps of Nôtre Dame from eight to nine minutes are requisite. Thus an hour must be deducted from the five or six during which the journeys were said to have been made. The street of St. Jacques, which Dujonquai had to ascend, is extremely steep. This would check the speed of a man laden and encumbered with bags of gold under his arm and in his pockets. The street is a great thoroughfare, especially in the morning, for three or six hours. The obstructions inevitable from this circumstance would accumulate considerably; half a league at least must be added to the five leagues and a half, which, as the crow flies, was the distance traversed. It

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happened that on the very day which Dujonquai fixed upon for his journeys, these ordinary obstructions were increased, from the removal by sixty or eighty workmen of an enormous stone to St. Génévière, and the crowd attracted by the spectacle. This must, even supposing him not to have yielded for a moment to the curiosity of seeing what attracted others, have added seven or eight minutes to each of his walks, which, in the twenty-six, would amount to two hours and a half. Both in his own house and that of Morangiés it must have been necessary for Dujonquai to open and shut the doors, to take the sacks, to place them in his pockets, to take them out, to lay them before Morangiés, who he affirmed, contrary to all probability, counted the sacks during the intervals of his journey, and not in his presence. Time must have been requisite also to take and read the receipts given by the count, during each journey. On his return home Dujonquai must have given them to some other person. Therefore, reckoning the time required to take and lay down the sacks, to open and shut the doors, to receive and read and deliver the acknowledgments, to conversations which Dujonquai allowed he had with several people, together with the obstacles we have mentioned, the truth of Dujonquai's statement was reduced to a physical impossibility."

2. Where the fact deposed to is improbable, or morally impossible.

§ 655. 2. Cases like the above are, however, necessarily uncommon; in most instances the exertions of the advocate must be directed to shewing the improbability, or at most the moral impossibility, of the fact deposed. The story of Susannah and the Elders in the Apocrypha affords a very early and most admirable example. The two false witnesses were examined out of the hearing of each other: on being asked under what sort of tree the criminal act was done, the first said "a mastick tree," the other "a holm tree." The

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judgment of Lord Stowell also in *Evans* v. *Evans* (*k*) shews how a supposed transaction may be disproved by its inconsistency with surrounding circumstances. "What had you for supper?" says a modern jurist (*l*). "To the merits of the cause, the contents of the supper were in themselves altogether irrelevant and indifferent. But if, in speaking of a supper given on an important or recent occasion, six persons, all supposed to be present, give a different bill of fare; the contrariety affords evidence pretty satisfactory, though but of the circumstantial kind, that at least some of them were not there." The most usual application of this is in detecting fabricated alibis. These seldom succeed if the witnesses are skilfully cross-examined out of the hearing of each other; especially as courts and juries are aware that a false alibi is a favourite defence with guilty persons, and consequently listen with suspicion even to a true one.

2°. Misrepresentation.

1. Exaggeration.

§ 656. 2°. Falsehood in toto is far less common than misrepresentation. 1. Under this head comes exaggeration—the dangers of which have been pointed out in the Introduction (*m*). There are, however, other forms (*n*). E. g. "Question—About what thickness was the stick with which you saw Reus strike his wife Defuncta? Answer—About the thickness of a man's little finger. In truth it was about the thickness of a man's wrist. Falsehood in this shape may be termed falsehood in *quantity*. Question—With what food did the gaoler Reus feed the prisoner Defunctus? Answer—With sea biscuit, in an ordinary eatable state. In truth, the biscuit was rotten and mouldy in great part. Falsehood in this shape may be termed falsehood in *quality*."

2. Evasion.

§ 657. 2. Evasion. Of the various resorts of evasion

(*k*) 1 Hagg. Cons. Rep. 105.
(*l*) 2 Benth. Jud. Ev. 9.
(*m*) Pt. 1, § 26.
(*n*) 1 Benth. Jud. Ev. 141.

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the most obvious and ordinary are *generality* and *indistinctness*. "Dolosus versatur in generalibus" (*o*). "Dolosus versatur in universalibus" (*p*). "Multiplex indistinctum parit confusionem" (*q*). Untruthful witnesses, as well as unreflecting persons, commonly use words expressing complex ideas, and entangle facts with their own conclusions and inferences. E. g. Question—What did A. B. (i. e. the plaintiff, defendant, &c., as the case may be) do? or say? Answer—"He promised," "He engaged," "He authorized," "He ratified," "He confessed," "He admitted," "It was understood," &c. &c. &c. The mode of detection here, is to elicit by repeated questions what actually did take place, thus breaking up the complex idea into its component parts, and separating the facts from the inferences. 2. Another form is that of "equivocation," or *verbal* truth telling—a practice much resorted by witnesses who are regardless of their oaths; as also by others who delude themselves into the belief that deception in this shape is, in a religious and moral point of view, either not criminal, or criminal in a less degree than actual falsehood. "Perjuri sunt qui, servatis verbis juramenti, decipiunt aures eorum qui accipiunt" (*r*).

1. Generality and indistinctness.

2. Equivocation.

§ 658. The maxim "falsus in uno, falsus in omnibus" (*s*), may be pushed too far. It must not be supposed that all the untrue testimony given in courts of justice proceeds from an intention to misstate or deceive. On the contrary, it most usually arises from interest or bias in favour of one party, which exercises on the minds of the witnesses an influence of which they are unconscious, and leads them to give distorted accounts of the matters to which they depose. Again, some

Effect of interest and bias in producing untrue testimony.

(*o*) 2 Co. 34 a; 3 Co. 81 a; Wing. M. 636.
(*p*) 2 Bulst. 226; 1 Rol. 157.
(*q*) Hob. 335. See 2 Benth. Jud. Ev. 147.
(*r*) 3 Inst. 166.
(*s*) Broom's Max. xxviii. 4th Ed.

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witnesses have a way of compounding with their consciences—they will not state positive falsehood, but will conceal the truth, or keep back a portion of it; while others, whose principles are sound and whose testimony is true in the main, will lie deliberately when questioned on particular subjects, especially on some of a peculiar and delicate nature. The mode of extracting truth by cross-examination is, however, pretty much the same in all cases; namely, by questioning about matters which lie at a distance, and then shewing the falsehood of the direct testimony by comparing it with the facts elicited.

General observations as to the course of cross-examination.

§ 659. Although in enumerating the means by which adverse witnesses are to be encountered, Quintilian puts first (*t*), "timidus (testis) terreri potest," menacing language and austerity of demeanor are not the most efficacious weapons for this purpose; for, although there are cases in which they may be employed with advantage, still in the vast majority of instances a mendacious, an untruthful, or an evasive witness is far more effectually dealt with by keeping him in good humour with himself, and putting him off his guard with respect to the designs of his interrogator. The terror of which Quintilian here speaks, must be understood with reference to a feeling of uneasiness occasioned by remorse of conscience, a sense of shame, a dread of disgrace and punishment, and a sort of undefined apprehension resulting from them all. The witness who is giving false testimony rarely knows what means the interrogator possesses of detecting and exposing him, far less those which may start up at any moment from the auditory at the trial (*u*). But the hardened villain who comes into the witness box prepared to swear to unmixed falsehood, and who perseveres in that intention despite every

(*t*) *Suprà*, § 653.

(*u*) See bk. 1, pt. 1, § 100.

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obstacle and every warning, is comparatively rare. On most minds the sanctions of truth (*x*) are in continual, though it may be, silent operation; and the iniquitous design of a witness to mislead or deceive a tribunal, has frequently yielded to the force of these when judiciously displayed to his mental vision. Here, and indeed in examinations ex adverso in general, the great art is to conceal, especially from the witness, the object with which the interrogator's questions are put. One mode of accomplishing this is by questioning the witness on indifferent matters, in order by diverting his attention, to cause him to forget the answer which it is desired to make him contradict. In a case of murder, to which the defence of insanity was set up; a medical witness, called on the part of the accused, swore that, in his judgment, the accused at the time he killed the deceased was affected with a homicidal mania, and urged to the act by an *irresistible* impulse. The judge, dissatisfied with this, first put to the witness some questions on other subjects, and then asked him "Do you think the accused would have acted as he did, if a policeman had been present?" to which the witness at once answered in the negative; on which the judge remarked, "your definition of irresistible impulse then must be, an impulse irresistible at all times except when a policeman is present."

Dangers of it.

§ 660. But if cross-examination is a powerful engine, it is likewise an extremely dangerous one, and often recoils fearfully, even on those who know how to use it. The young advocate should reflect that, if the transaction to which a witness speaks really occurred, so constant is the operation of the natural sanction of truth (*y*), that he is almost sure to recollect every *material* circumstance by which it was accompanied; and

(*x*) See Introd. pt. 1, §§ 16—20, and pt. 2, §§ 55—59.

(*y*) Introd. pt. 1, § 16.

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the more his memory is probed on the subject, the more of these circumstances will come to light, thus corroborating instead of shaking his testimony. And forgetfulness on the part of witnesses of *immaterial* circumstances, not likely to attract attention, or even slight discrepancies in their testimonies respecting them, so far from impeaching their credit, often rather confirms it. Nothing can be more suspicious than a long story, told by a number of witnesses who agree down to the minutest details. Hence it is a well-known rule, that a cross-examining advocate ought not, in general, to ask questions the answers to which, if unfavourable, will be conclusive against him; as, for instance, in a case turning on identity, whether the witness is sure, or will swear, that the accused is the man of whom he is speaking. The judicious course is to question him as to surrounding or even remote matters; his answers respecting which may shew that, in the testimony he gave in the first instance, he either spoke falsely or was mistaken. Under certain circumstances, however, perilous questions must be risked; especially where a favourable answer would be very advantageous, and things already press so hard against the cause of the cross-examining advocate, that it could scarcely be injured by an unfavourable one.

Talkative witnesses.

§ 661. The words "longus (testis) protrahi (potest)" (*z*) are omitted in some copies of Quintilian, but are retained in the best editions, and have every appearance of genuineness. Their meaning is, that a witness who either from self-importance, a desire to benefit the cause of the opposite party, or any other reason, displays a loquacious propensity, should be encouraged to talk, in order that he may either fall into some contradiction, or let drop something that may be serviceable to the party

(*z*) *Suprà*, § 653.

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interrogating. "Of this damning kind," observes the author of a judicious pamphlet (*a*), "are witnesses who prove *too much;* for instance, that a horse is the better for what the consent of mankind calls a blemish or a vice. The advocate on the other side never desires stronger evidence than that of a witness of this sort: he leads the witness on from one extravagant assertion in his friend's behalf to another; and, instead of desiring him to mitigate, presses him to aggravate, his partiality, till at last he leaves him in the mire of some monstrous contradiction to the common sense and experience of the court and jury; and this the advocate knows will deprive his whole testimony of credit in their minds."

Course of cross-examination should be subordinate to general plan for the conduct of the cause.

§ 662. The course of cross-examination to be pursued in each particular cause, should be subordinate to the plan which the advocate has formed in his mind for the conduct of it. Writers on the art of war, to which forensic battles have so often been compared, lay down as a principle that every campaign should be conducted with some definite object in view; or, as they express it, that no army should be without its line of operation. There is, however, this difference, that the line of operation of an army can seldom be changed after fighting has begun, whereas matters transpiring in the course of a trial frequently disclose grounds of attack or defence

(*a*) Hints to Witnesses in Courts of Justice, by a Barrister (Baron Field). London. 1815. We cite from the Law Mag. vol. 25, p. 361. When corporal punishment in the army excited so much interest some time since —one party denouncing it as useless cruelty, and the other insisting on it as indispensable to the government of an army—the author met an officer who warmly defended the practice; and, having first taken care to ascertain that none of his hearers had witnessed a military flogging, assured them with great earnestness that there was nothing in it; he had seen a soldier receive *nine hundred and fifty* lashes and not mind it in the least. It never occurred to this zealous person, that if that were true, the usual punishments of 50, 100, or 350 lashes could not be a very effective means of enforcing military dicipline.

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imperceptible at its outset; the seizing on which, and adapting them to the actual state of things, requires that "ingenio veloci ac mobili, animo præsenti et acri," which Quintilian in another place pronounces so essential to an advocate (*b*). But the analogy is very close in one respect. Like the general, the advocate should always consider whether he is the attacking or defending party, and beware of undertaking the offensive, or of assuming the burden of proof unless he is strong enough to do so. The violation of this principle is a very common, because very natural, fault in the defence of criminal cases. Oftentimes the only chance of escape is that the proof against the accused may fall short, and all the energies of his advocate should be directed to show that it does. But if, abandoning this defensive attitude, he assumes the offensive—talks of the accused as an innocent man whom it is sought to oppress, denounces the prosecution as founded in spite, and the evidence by which it is supported as based on perjury, and fails, as without evidence or facts he must fail, in convincing the tribunal of this, the condemnation of his client follows as matter of course.

Conclusion.

§ 663. The faculty of interrogating witnesses with effect is unquestionably one of the arcana of the legal profession, and, in most instances at least, can only be attained after years of forensic experience. Cross-examination, or examination ex adverso, is the most effective of all means for extracting truth; much perjured testimony is prevented by the dread of it; and few pleasures exceed that afforded, by witnessing its successful application in the detection of guilt or the vindication of innocence. In direct examination, although mediocrity is more easily attainable, it may be a question whether the highest degree of excellence is not even

(*b*) Quintil. Inst. Orat. lib. 6, c. 4.

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still more rare. For it requires mental powers of no inferior order so to interrogate each witness, whether learned or unlearned, intelligent or dull, matter of fact or imaginative, single-minded or designing, as to bring his story before the tribunal in the most natural, comprehensible, and effective form. Having in the present chapter endeavoured to illustrate this important subject, we cannot dismiss it without a caution. Maxims of every kind should be to us as guides—to shorten, as has been well observed, the turnings and windings of experience—not as stern masters to stifle the inspirations of genius; and the greatest advocate is he who, perfectly conversant with the established rules of his art, knows when to break them, alike with safety and advantage.

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APPENDIX.

No. 1.

ILLUSTRATIONS OF PRESUMPTIVE EVIDENCE IN CRIMINAL CASES.

1.

Case of William Richardson, Dumfries, A. D. 1787 (*a*).

In the autumn of 1786, a young woman, who lived with her parents in a remote district in the stewartry of Kircudbright, was one day left alone in the cottage, her parents having gone out to their harvest-field. On their return home, a little after mid-day, they found their daughter murdered, with her throat cut in the most shocking manner. The circumstances in which she was found,—the character of the deceased, and the appearance of the wound, all concurred in excluding any presumption of suicide; while the surgeons who examined the wound were satisfied that it had been inflicted by a sharp instrument, and by a person who must have held the instrument in his left hand. On opening the body, the deceased appeared to have been some months gone with child; and on examining the ground about the cottage, there were discovered the footsteps, seemingly of a person who had been running hastily from the cottage, and by an indirect road, through a quagmire or bog, in which there were stepping-stones. It appeared, however, that the person, in his haste and confusion, had slipped his foot, and stepped into the mire, by which he must have been wet nearly to the middle of the leg. The prints of the footsteps were accurately measured, and an exact impression taken of them; and it appeared that they were those of a person who must have worn shoes, the soles of which had been newly mended, and which, as is usual in that part of the country, had iron knobs or nails in them. There were discovered also, along the track of the footsteps, and at certain

(*a*) Taken from Burnett's Criminal Law of Scotland, p. 524.

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intervals, drops of blood; and on a stile or small gateway near the cottage, and in the line of the footsteps, some marks resembling those of a hand which had been bloody. Not the slightest suspicion at this time attached to any particular person as the murderer; nor was it even suspected who might be the father of the child of which the girl was pregnant. At the funeral, a number of persons of both sexes attended; and the stewart-depute thought it the fittest opportunity of endeavouring, if possible, to discover the murderer; conceiving rightly, that, to avoid suspicion, whoever he was, he would not, on that occasion, be absent. With this view he called together, after the interment, the whole of the men who were present, being about sixty in number. He caused the shoes of each of them to be taken off, and measured: and one of the shoes was found to resemble pretty nearly the impression of the footsteps hard by the cottage. The wearer of this shoe was the schoolmaster of the parish; which led immediately to a suspicion, that he must have been the father of the child, and had been guilty of the murder, to save his character. On a closer examination, however, of the shoe, it was discovered that it was pointed at the toe, whereas the impression of the footstep was rounded at that place. The measurement of the rest went on; and after going through nearly the whole number, one at length was discovered, which corresponded exactly to the impression, in dimensions, shape of the foot, form of the sole, apparently newly mended, and the number and position of the knobs. William Richardson, the young man to whom the shoe belonged, on being asked where he was the day the deceased was murdered, replied, seemingly without embarrassment, that he had been all that day employed at his master's work; a statement which his master and fellow-servants, who were present, confirmed. This going so far to remove suspicion, a warrant of commitment was not then granted; but some circumstances occurring a few days thereafter, having a tendency to excite it anew, the young man was apprehended and lodged in jail. On his examination, he acknowledged he was left-handed; and, some scratches being observed on his cheek, he said he had got them when pulling nuts in a wood, a few days before. He still adhered to what he had said, of his having been on the day of the murder employed constantly at his master's work, at some distance from the place where the deceased resided; but, in the course of the precognition, it turned out, that he had been absent from his work about half an hour (the time being distinctly ascertained) in the course of the forenoon of that day; that he called at a smith's shop under pretence of wanting something, which it

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did not appear he had any occasion for: that this smith's shop was in the way to the cottage of the deceased. A young girl, who was some hundred yards from the cottage, said, that about the time the murder was committed (and which corresponded to the time that Richardson was absent from his fellow-servants), she saw a person, exactly with Richardson's dress and appearance, running hastily toward the cottage, but did not see him return, though he might have gone round by a small eminence, which would intercept him from her view, and which was the very track where the footsteps had been traced. His fellow-servants now recollected, that, on the forenoon of that day, they were employed, with Richardson, in driving their master's carts, and when passing by a wood which they named, Richardson said that he must run to the smith's shop, and would be back in a short time. He then left his cart under their charge; and they, having waited for him about half an hour,—which one of the servants ascertained, by having at the time looked at his watch,—they remarked on his return, that he had been longer absent than he said he would. To which he replied, that he had stopped in the wood to gather some nuts. They observed at this time one of his stockings wet and soiled, as if he had stepped into a puddle; on which they asked where he had been? He said he had stepped into a marsh, the name of which he mentioned; on which his fellow-servants remarked, "that he must have been either drunk or mad, if he had stepped into that marsh," as there was a foot-path which went along the side of it. It then appeared, by comparing the time he was absent, with the distance of the cottage from the place where he had left his fellow-servants, that he might have gone there, committed the murder and returned to them. A search was then made for the stockings he had worn that day. They were found concealed in the thatch of the apartment where he slept; appeared to be much soiled, and to have some drops of blood on them. The last he accounted for, by saying, first that his nose had been bleeding some days before; but it being observed that he had worn other stockings on that day, he next said, he had assisted at bleeding a horse, when he wore those stockings; but it was proved, that he had not assisted, but had stood on that occasion at such a distance, that none of the blood could have reached him. On examining the mud or sand upon the stockings, it appeared to correspond precisely with that of the mire or puddle adjoining to the cottage, and which was of a very particular kind, none other of the same kind being found in that neighbourhood. The shoemaker was then discovered, who had mended his shoes a short

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time before; and he spoke distinctly to the shoes of the prisoner, which were exhibited to him, as having been those he had mended. It then came out, that Richardson had been acquainted with the deceased, who was considered in the county as of weak intellect, and had on one occasion been seen with her in a wood, in circumstances that led to a suspicion, that he had had criminal conversation with her; and on being gibed with having such connexion with one in her situation, he seemed much ashamed, and greatly hurt. It was proved farther, by the person who sat next to him when the shoes were measuring, that he trembled much, and seemed a good deal agitated; and that, in the interval between that time and his being apprehended, he had been advised to fly, but his answer was, "Where can I fly to?" On the other hand, evidence was brought to shew that, about the time of the murder, a boat's crew from Ireland had landed on that part of the coast, near to the dwelling of the deceased; and it was said some of that crew might have committed the murder, though their motives for doing so it was difficult to explain,—it not being alleged that robbery was their purpose, or that anything was missed from the cottages in the neighbourhood. The jury by a great plurality of voices found him guilty. Before his execution, he confessed he was the murderer; and said it was to hide his shame that he committed the deed, knowing that the girl was with child to him. He mentioned also to the clergyman who attended him, where the knife would be found, with which he had perpetrated the murder. It was found accordingly in the place he described (under a stone in a wall), with marks of blood upon it.

2.

Case of Mary Ann Burdock, Bristol, A.D. 1835.

Mary Ann Burdock was tried before the Recorder of Bristol, in April, 1835, for the murder of Clara Ann Smith, on the 23rd October, 1833. The deceased, who was an elderly lady, possessed of some property, went to live with the accused, who kept a lodging-house in Bristol, and was in rather bad circumstances. On the day in question, the deceased being confined to her bed from a cold, the accused was very urgent with her to take some gruel, which she refused for some time, but at last consented. Shortly after taking it she was seized with the symptoms of poisoning from arsenic, and died in a few hours. No medical assistance

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was procured, nor were her relatives made acquainted with her death by the accused; who caused her to be privately buried,—telling the undertaker that an old lady had died in her house, who had no friends, and that she must bury her, as the things belonging to her were worth little or nothing. The interment took place on the 31st October, 1833, and nothing further occurred until the month of December, 1834; when some circumstances, especially a change in the habits and mode of life of the accused, having excited suspicion, the body was disinterred on the 24th of that month, and found in a remarkably good state of preservation. An anatomical examination of the body, and a chemical analysis of a portion of it, which have received great praise in the medical and scientific worlds, detected the presence of arsenic; no less than four grains of the *sulphuret* having been actually procured from one portion of the intestines, while the poison in other forms was extracted from others; and the suspected party was accordingly taken into custody and brought to trial. In addition to the facts already stated, it appeared that, some days before the death of the deceased, the accused had purchased a quantity of the *sulphuret* of arsenic, under the groundless pretence of killing rats; and had also hired a girl to wait on the deceased, whom she especially cautioned several times to be very careful not to touch any thing after the deceased, falsely representing her as "a dirty old woman, who spat in every thing." It appeared also, by the testimony of this girl, that before administering the gruel to the deceased, the accused brought it into an adjoining room, where she put some pinches of a *yellow* powder into it; saying to the witness that her object in this was to ease the deceased from pain, but that the witness was not to tell the deceased that there was anything in the gruel, as if she knew there was she would not take it, and would think they were going to kill her. The accused then carefully washed her hands twice. While the deceased was in the agonies of death, moaning and rolling about in her bed, the accused, who was in the room, opened a table drawer, took out some bits of candle and a rushlight, saying to the servant, "Only think of the old b——h having these things." This expression she repeated after the death of the deceased, on finding some other articles of small value. She cautioned the servant on leaving her house not to tell anything of the deceased, or that she had lived with her, or that she had ever seen her, the accused, put anything into the gruel, as people might think it curious. On this evidence Mary Ann Burdock was convicted and executed.

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3.

Jacob. Jans, A.D. 1643 (*a*).

The following case is inserted as illustrative of the views of the civilians, at least those of the Dutch school, on the subject of presumptive proof in criminal proceedings. It has been selected for the reason that, notwithstanding the antiquity of the case and the source whence it is taken, no evidence not receivable by the English law, as it stands at the present day, appears to have been adduced:—

Quidam Suffridus Wiggeri dimicaverat cum alio, cui nomen Jacob. Jans; illo penès se non habente cultrum; Jacobus aliquoties Suffridum suo cultro impetierat: donec à circumstantibus ei culter extortus est, cum nemo Suffridum vidisset aut sciret esse percussum. Is exinde in eodem loco per integram ferè horam sederat in scamno quodam, nullâ de vulnere querelâ. Deinde egressus mox rediit, pileum tenens refertum suis intestinis, nec multo post extinctus est, nullâ cum alio pugnâ rixâve habitâ. Moribundus aiebat, à Jacobo se vulneratum, & hic, objectantibus quibusdam vulnus Suffrido inflictum, responderat aliis quidem, non esse tam grave vulnus; aliàs tacuerat. Post mortem Suffridi, Jacobus accusatus, negabat factum; probabat etiam, Suffridum aliquot septimanis antè, cum apud secretum vincula femoralium solvere non posset, cultro illa diffindere conatum esse, tam imprudenter, ut parum abesset quin cultrum ventri impegisset. Hoc non erat impossibile, quo minus & tunc evenire potuisset; Curia tamen, factum peremptorium non exactè probatum adeo circumstantiis undique pressum, judicavit ut non dubitaverit, Jacobum, etsi necdum annos XX natum, omissâ questione, capitali addicere supplicio.

For further instances of convictions on purely presumptive evidence, see the cases of Richard Patch, Surrey Sp. Ass. 1806 (Report by Gurney); of F. B. Courvoisier, Sessions Papers of the Cent. Cr. Court for July, 1840; of John Tawell, Aylesbury Sp. Ass. 1845, Wills, Circ. Evid. 198, 3rd ed.; and those of W. Howe, alias Wood, *id.* 234; and Smith and others, *id.* 237; *The Commonwealth* v. *Webster*, Report by Bemis, Boston, 1850.

(*a*) Huberus, Prælectiones Juris Civilis, lib. 22, tit. 3, N. 4.

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No. II.

CONFESSIONS OF WITCHCRAFT.

As a specimen of the confessions of witchcraft in the 17th century, we subjoin the examinations of two of the Essex witches in 1645, which purport to have been taken before Sir Harbottell Grimston, Knt. and Baronet, one of the members of the Hon. the House of Commons, and Sir Thomas Bowes, Knt., another of his majesty's justices of the peace for that county (*a*).

"The examination of Anne Cate, alias Maidenhead, of Much Holland, in the county aforesaid, at Mannintree, 9th May, 1645.

"This examinant saith that she hath four familiars, which she had from her mother about two and twenty years since; and that the names of the said imps are, James, Prickeare, Robyn, and Sparrow; and that three of these imps are like mouses, and the fourth like a sparrow, which she called Sparrow: to whomsoever she sent the said imp Sparrow, it killed them presently: and that, first of all, she sent one of her three imps like mouses, to nip the knee of one Robert Freeman, of Little Clacton, in the county of Essex aforesaid, whom the said imp did so lame that he died on that lameness within half a year after: that she sent the said imp Prickeare to kill the daughter of John Rawlins, of Much Holland aforesaid, who died accordingly within a short time after; and that she sent her said imp Prickeare to the house of one John Tillet, which did suddenly kill the said Tillet: that she sent her said imp Sparrow to kill the child of one George Parby, of Much Holland aforesaid, which child the said imp did presently kill; and that the offence this examinant took against the said George Parby, to kill his said child, was because the wife of the said Parby denied to give this examinant a pint of milk: that she sent her said imp Sparrow to the house of Samuel Ray, which, in a very short time, did kill the wife of the said Samuel; and that the cause of this examinant's malice against the said woman was, because she refused to pay to this examinant twopence, which she challenged to be due to her; and that afterwards her said

(*a*) 4 How. State Trials, pp. 817 *et seq.*

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imp Sparrow killed the said child of the said Samuel Ray. And this examinant confesseth, that, as soon as she had received the said four imps from her said mother, the said imps spake to this examinant, and told her she must deny God and Christ, which this examinant did then assent to" (*a*).

The confession of Rebecca West, taken before the said justices, 21st March, 1645:—"This examinant saith, that, about a month since, Anne Leach, Elizabeth Gooding, Hellen Clark, Anne West, and this examinant, met altogether at the house of Elizabeth Clark, in Mannyntree, where they together spent some time in praying unto their familiars, and every one of them went to prayers: afterwards some of them read in a book, the book being Elizabeth Clark's: and this examinant saith, that forthwith their familiars appeared, and every one of them made their several propositions to those familiars, what every one of them desired to have effected: that, first of all, the said Elizabeth Clark desired of her spirit that Mr. Edwards might be met withal, about the middle bridge, as he should be come riding from Eastberryhoult, in Surrey; that his horse might be scared, and he thrown down, and never rise again: that the said Elizabeth Gooding desired of her spirit, that she might be avenged on Robert Tayler's horse, for that the said Robert suspected said Elizabeth Gooding for the killing of a horse of the said Robert formerly: that the said Hellen Clark desired of her spirit, that she might be revenged on two hogs in Misley-street (being the place where the said Hellen lived), one of the hogs to die presently, and the other to be taken lame: that Anne Leach desired of her spirit that a cow might be taken lame of a man's living in Mannyntree, but the name of the man this examinant cannot remember: that the said Anne West, this examinant's mother, desired of her spirit that she might be freed from all her enemies and have no trouble. And this examinant saith, that she desired of her spirit that she might be revenged on Prudence, the wife of Thomas Hart, and that the said Prudence might be taken lame on her right side. And, lastly, this examinant saith, that, having thus done, this examinant and the other five did appoint the next meeting to be at the said Elizabeth Gooding's house, and so departed all to their own houses" (*b*).

(*a*) 4 Howell's State Trials, p. 856. (*b*) Id. p. 840.

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